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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FREEMAN M. COOPER,
Plaintiff-Appellant/Petitioner,

VS.

THE WILLIAMSON COUNTY BOARD OF EDUCATION,
Defendant-Appellee/Respondent.

Petition for Writ of Certiorari to the
Supreme Court of Tennessee

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a hearing before a biased school board on charges of misconduct against a tenured teacher resulting in that teacher's discharge satisfy the requirements of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and of this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), for a meaningful pre-termination hearing?

2. Is the due process deprivation resulting from the discharge of a tenured teacher by a biased school board cured by the availability of judicial review *after* the discharge has occurred?

PARTIES TO THE PROCEEDINGS BELOW

The decision below, of which review is sought, was rendered by the Supreme Court of Tennessee. The sole plaintiff-appellant before the Supreme Court of Tennessee was Freeman M. Cooper, the petitioner. The sole defendant-appellee before the Supreme Court of Tennessee was the Williamson County Board of Education, the respondent.

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PETITION FOR WRIT OF CERTIORARI

DECISION FROM WHICH REVIEW IS SOUGHT

The Petitioner, Freeman M. Cooper [hereafter referred to as "Cooper"], submits this petition for a writ of certiorari to the Supreme Court of Tennessee for review of that Court's decision in Freeman M. Cooper v. The Williamson County Board of Education, Tennessee Supreme Court Docket No. 89-36-I (filed September 17. 1990) (Appendix A). Cooper filed a timely petition for rehearing, which was denied on November 13, 1990 (Appendix E).

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of which review is sought was filed by the Supreme Court of Tennessee on September 17, 1990. Cooper filed a timely

petition to rehear. The Supreme Court of Tennessee entered an order on November 13, 1990 denying the petition to rehear.

This Court has jurisdiction to review the judgment of the Supreme Court of Tennessee by writ of certiorari in accordance with 28 U.S.C. §1257. Cooper seeks review of that portion of the decision of the Supreme Court of Tennessee wherein that Court determined that the availability of *de novo* review of a school board's decision to dismiss a tenured teacher cured any due process deprivation resulting from an initial termination of employment by a biased and partial school board (Appendix A, pp. A-5-A-6). The procedures used by the Board to discharge Cooper, sanctioned by the Supreme Court of Tennessee, effectively deprived Cooper of his property, i.e., his right as a tenured teacher to continued employment, without due process, in violation of his rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Constitution of the United States, Amendment 14, Section 1.

STATEMENT OF THE CASE

Freeman M. Cooper was employed in the Williamson County School System from 1965 until his discharge by the Board on February 7, 1986. At the time of his discharge, Cooper held tenure pursuant to the provisions of the Tennessee Teacher Tenure Act, Sections 49-5-501, *et seq.*, Tennessee Code Annotated [Appendix F].

Cooper, a black teacher and former principal in an all-black school, engaged in a 15-year struggle with the Williamson County School System in an effort to obtain a principal's position after the school system was desegregated. Cooper's struggle culminated in June, 1984, when the United States District Court for the Middle District of

Tennessee ruled that the Board had discriminated against Cooper on the basis of his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq*. *See, Cooper v. Williamson County Board of Education*, 820 F.2d 180, 181 (6th Cir. 1987). The district court ordered the Board to place Cooper in the position as principal in the Williamson County School System with all the rights, duties, and responsibilities of a principal at a school as comparable as possible to the principalship at Page High School, one of the principalships he had sought and been discriminatorily denied. [D.C. Tr. p. 212].[1]

In August, 1984, under threat of contempt, the Board placed Cooper in the principal's position at Fairview High School, thereby displacing an experienced white principal at this predominately white school. *Cooper v. Williamson County Board of Education, supra*, 820 F.2d at 181. Fairview High School began the 1984-85 school year with a total black enrollment of one student [D.C. Tr. p. 212, D.C. Ex. 25]. Former Williamson County School Superintendent John Netterville, who recommended Cooper's placement at Fairview High School, expected a great deal of disruption to occur at the school when Cooper began his duties there in the fall of the 1984-85 school year [D.C. Tr. p. 243].

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[1] The trial from which this case originates took place in the Williamson County Chancery Court on December 13, 1988. The record includes the stenographic transcript of that trial, which will be referred to herein as "[12/13/88 Tr. p. ____]", and exhibits introduced at that trial, referred to as "[12/13/88 Tr. Ex. ____]." The record also includes a bound volume of pleadings filed in the Williamson County Chancery Court, which will be referred to as "[R. p. ____]." The December 13, 1988, trial resulted from a remand by the Supreme Court of Tennessee after the initial trial of this case which had been held on November 5, 1986. *See Cooper v. Williamson County Board of Education*, 746 S.W. 176 (Tenn. 1987) [Appendix C]. The record includes the stenographic transcript and exhibits from the November 5, 1986, trial as well, referred to herein as "[11/5/86 Tr. p. ____]" and [11/5/86 Tr. Ex. ____]." Finally, the record includes the transcript and exhibits from a May, 1986, hearing in the United States District Court for the Middle District of Tennessee in *Cooper v. Williamson County Board of Education*, Civil Action No. 3-80-3393. The transcript and exhibits from that hearing were filed as Exhibit 3 at the November 5, 1986, trial of this case and designated in Cooper's offer of proof to the Williamson County Chancery Court at the November 5, 1986, trial. The transcript and exhibits from that hearing will be referred to herein as "[D.C. Tr. p. ____]" and "[D.C. Ex. ____]," respectively.

"Cooper's year at Fairview was an eventful one to say the least, with bomb scares, student walk-outs, and conflicts with the faculty." *Cooper v. Williamson County Board of Education, supra*, 820 F.2d at 181. On Monday, November 12, 1984, less than three months after Cooper began his duties at Fairview High School, Williamson County School Superintendent Kenneth L. Fleming issued a press release stating publicly that he intended to initiate proceedings to have Cooper dismissed [D.C. Ex. 44]. As Judge Wellford noted:

> "After fifteen years of struggle with the School Board, Mr. Cooper vindicated his rights. Within weeks, however, he was confronted with a 'Motion for Relief' filed by Fleming, the Superintendent of Schools, in which Fleming sought permission to bring charges against him under the Tennessee Teacher Tenure Act. Fleming was the Superintendent of Schools fifteen years earlier when Mr. Cooper's troubles began." *Cooper v. Williamson County Board of Education, supra*, 820 F.2d at 184-85 (Wellford dissenting).

Fleming then filed charges against Cooper, and after a lengthy hearing the charges were dismissed by the Board on April 1, 1985, over the objections of Board members Tom Gore, Jr., Lily Beard, and Norman Coffman. After the vote on the charges, Beard accused the remaining Board members of destroying Fairview High School by its vote to dismiss the charges [D.C. Tr. p. 315]. Board member Tom Gore, Jr., had made up his mind as of April 1, 1985, that Cooper should be dismissed and never changed his mind from that date until Cooper's ultimate dismissal on February 7, 1986 [11/5/86 Tr. pp. 80-81].

After the Board dismissed the charges against Cooper on April 1, 1985, the unrest at Fairview High School increased [12/13/88 Tr. p. 332]. Cooper, Judge Wiseman and Board Chairman Houston Naron all received threatening telephone calls [12/13/88 Tr. pp. 33-34]. A number of teachers were involved in the unrest at Fairview High School in early April, 1985. [12/13/88 Tr. p. 334].

The Board subsequently met on April 15, 1985. At that meeting, Fleming played a tape recording of a portion of his April 8 meeting

with Cooper where he interrogated Cooper over his recommendation for a vacant teaching position at Fairview High School [D.C. Ex. 22]. Fleming sent numerous letters to Cooper complaining about various matters, sometimes sending as many as three letters in a single day [D.C. Exs. 6, 10, 12, 14, 15, 16, 17, 18, 19, 42, 43, 53]. Fleming routinely sent copies of these letter to the Board, and regularly reported to the Board about problems he perceived in connection with Cooper's services as principal of Fairview High School.

The Board met at Fairview High School on June 5, 1985 [D.C. Ex. 47]. One of the topics of discussion at that meeting was a recommendation by the Board's attorney that a Board committee be created to assist in the development of the management action plan, a plan the Board had directed Cooper and Fleming to prepare at its April 1 meeting. Board member Tom Gore, Jr., joined with Fleming in vigorously opposing the creation of any committee to work with Cooper and Fleming in the development of the management action plan [11/5/86 Tr. pp. 68-80]. Before an audience expressing considerable dissatisfaction with Cooper's presence at Fairview High School, the Board voted in favor of Gore's motion that no committee be formed to assist Cooper and Fleming in the development of the management action plan [12/13/88 Tr. p. 327]. At the same meeting, Board member Lily Beard expressed her opinion that no plan for Cooper would work as long as he remained at Fairview High School, and that Fairview High School needed a new principal before school started in the fall of 1985 [D.C. Tr. pp. 318-33; 12/13/88 Tr. Ex. 24]. Board member Norman Coffman stated publicly at that meeting that the Board did not need a federal judge to tell the Board how to run the school system, obviously in reference to the District Court's order that Cooper be made a principal in the Williamson County School system [12/13/88 Tr. Ex. 24; D.C. Ex. 47].

At the Board's August 5, 1985, meeting, Cooper appeared and requested transfers of the teachers who had been fomenting unrest at the school. Several of these teachers had also testified against Cooper in the dismissal proceedings in March and April, 1985, and had been actively involved in additional unrest after April 1, 1985. [D.C. Tr. pp. 561-69; D.C. Exs. 61, 62, 63, 64]. The Board refused to consider

Cooper's request for involuntary transfers of these teachers, even though they had openly condoned and participated in unrest at Fairview High School, and even though one of the transfer requests was for Cooper's own secretary [12/13/88 Tr. pp. 337-42, Ex. 58].

Fleming kept the Board constantly aware of his complaints about Cooper's performance [D.C. Exs. 10, 12, 14, 15, 16, 17, 18, 20]. Fleming's letters to Cooper were routinely provided to the Board in the guise of Fleming's progress reports on the management action plan. On October 21, 1985, Fleming provided to the Board a compilation of more than 100 pages of letters written by Fleming and others complaining about Cooper's performance as principal of Fairview High School [D.C. Ex. 20].

The Board was fully aware of the difficulty Cooper was having in his dealings with Fleming and the management action plan and of Fleming's abusive treatment of Cooper. On April 15, 1985, the Board heard Fleming's recording of his interrogation of Cooper regarding a teaching vacancy at Fairview High School. On August 5, 1985, Fleming provided the Board with a copy of Cooper's letter to Fleming of July 30, 1985, in which Cooper complained about the extensive documentation required by Fleming under the management action plan [D.C. Ex. 13]. Fleming's management action plan report of October 21, 1985, included letters from Cooper to Fleming dated September 17 and September 25, 1985, wherein Cooper expressed the difficulty he was having in working with Fleming [D.C. Ex. 20]. Cooper spoke with two Board members about his difficulties with Fleming and the management action plan [D.C. Tr. pp. 447-59, 465-73].

On November 18, 1985, the United States District Court for the Middle District of Tennessee entered an order denying Cooper's petition for an interim award of attorneys' fees for services rendered by Cooper's previous attorneys in connection with the dismissal hearing in March and April, 1985. *See, Cooper v. Williamson County Board of Education, supra,* 820 F.2d at 181. Two days later, the Board's attorney sent a memo to the executive committee of the Board stating:

> "Enclosed is Judge Wiseman's memorandum opinion and order regarding the attorney fee issue in the Cooper case. *I believe that it gives some direction as to the court's feelings regarding its role in any future action that would be taken by the Board pursuant to the Teacher Tenure Act.*" [12/13/88 Tr. Ex. 52] [Emphasis supplied].

On November 22, 1985, the Board's attorney sent a letter to Cooper's attorney, presenting a proposal for a buy-out of whatever claims Cooper might have against the Board [12/13/88 Tr. Ex. 54]. That letter established December 15, 1985, as the deadline for acceptance of the buy-out proposal. The Board's attorney and its chairman arrived at the December 15 date in order to coincide with the Board's scheduled meeting of December 16 [12/13/88 Tr. p. 354]. As of November 22, no charges against Cooper were pending.

The Board met again on November 25, 1985, just five days after its attorney sent his memo to the executive committee. At that time, Fleming allegedly had not give any though to filing charges against Cooper and had prepared no charges to file against Cooper [D.C. Tr. p. 590]. Fleming had insisted that he would not bring further charges against Cooper unless directed to do so by the Board [11/5/86 Tr. p. 177]. The Board had issued no such directive. Yet, Fleming had already obtained a quote from his attorney for the fee to be charged to prosecute dismissal proceedings against Cooper, and the Board's attorney had already consulted with the Tennessee Board of Professional Responsibility and determined that he could not represent both the Board and Fleming in dismissal proceedings against Cooper [12/13/88 Tr. Ex. 53]. In addition, the Board's attorney had met prior to November 25 with Fleming and Fleming's attorneys to discuss Cooper's dismissal [11/5/86 Trial, Offer of Proof, Dep. of Robert G. Wheeler, Jr., pp. 24-25].

At the November 25 Board meeting, after Cooper presented an extensive report in accordance with the management action plan, Board member Tom Gore, Jr. moved to dismiss Cooper immediately [11/5/86 Tr. p. 82]. Gore was prepared to dismiss Cooper immediately, even though no charges had been filed against Cooper and no hearing

had been held on any allegations of misconduct. [11/5/86 Tr. pp. 82-84]. Gore's motion was subsequently amended to direct Fleming to prepare charges against Cooper and to call for a private attorney-client-meeting to discuss the charges sought by the Board [Minutes of November 25, 1985, Board Meeting, attached to 11/5/86 Tr. Ex. 7; 12/13/88 Tr. Ex. 53]. The Board also authorized Fleming to appear before the Williamson County Commission, the governing body in Williamson County, to request an additional appropriation to the Board of $10,000.00 to pay Fleming's attorney's fees for preparation and prosecution of the charges called for by the Board, in accordance with the quote Fleming had obtained from his attorneys.

The Board met again on December 16, 1985, and certified the charges presented to it by Fleming. Prior to certification of the charges, the Board agreed to pay Fleming's attorney's fee for prosecution of the charges, totaling $10,000.00, and signed a check for that fee prior to Fleming's official presentation of the charges [11/5/86 Tr. Ex. 7, Request No. 65; 11/5/86 Trial, Offer of Proof, Videotape of December 16, 1985, Board Meeting].

On January 27, 28, 29, and February 6, 1986, the Board sat in judgment on the dismissal charges it had directed Fleming to prepare and the prosecution of which it had funded. The Board received evidence consisting of documents it had previously received and reviewed at its regular meetings since April 1, 1985. The Board ultimately dismissed Cooper, effective February 7, 1986, largely for violations of the management action plan, for which no other teacher in the Williamson County School System could have been dismissed.

The hearing in January and February, 1986, was accompanied by a great deal of publicity. The discharge proceedings before the Board were telecast by a local television station [11/5/86 Tr. Ex. 1, p. 4]. A security staff was present during the entire hearing to prevent unruly behavior by those observing the hearing [11/5/86 Tr. Ex. 1, p. 5]. At the outset of the hearing, Cooper's attorneys moved for a dismissal of the charges based upon the Board's inability to render a fair and impartial decision [11/5/86 Tr. Ex. 1, pp. 10-13]. The Board ultimately denied the motion and discharged Cooper.

Cooper originated this action by filing a petition for review in the Chancery Court of Williamson County, Tennessee, in accordance with the requirements of Section 49-5-513, Tennessee Code Annotated. Cooper alleged in his complaint that his dismissal by the Board violated the Tennessee Open Meetings Act, Section 8-44-101, *et seq.*, Tennessee Code Annotated; the Tennessee Teacher Tenure Law, Section 49-5-501, *et seq.*, Tennessee Code Annotated; deprived him of his property without due process of law; and was unlawful, arbitrary, and capricious [R. p. 1].

The case was initially tried before the Williamson County Chancery Court, without a jury, on November 5, 1986. On January 5, 1987, the Chancellor issued his memorandum opinion and decree, dismissing all claims made by Cooper against the Board. In denying Cooper's due process claim, the Chancellor stated:

> "Cooper contends that several of the Board members which sat in judgment on the charges against him had decided before the hearing to vote for his dismissal from the school system. He contends that the Board as a whole demonstrated a bias in favor of his dismissal by directing Fleming to prepare charges and providing payment of fees to Fleming's legal counsel. Cooper does not attack the constitutionality of T.C.A. 45-5-513. The thrust of his argument is that the asserted fact that this particular Board was not an impartial tribunal renders the Board's dismissal of him an arbitrary, capricious and unlawful act. The problem with this contention is that the Tennessee Teacher Tenure Law pre-supposes that the Board will have prior knowledge of the accusations against a tenured teacher, will have approved the charges as to sufficienty (sic), and may have participated directly or indirectly in the preparation and investigation of the charges. Nonetheless, the Teacher Tenure Act does not require or permit the Board to recuse itself nor is a biased member required or permitted to recuse himself from the duty of hearing the evidence and passing judgment on the charges. *The due process problem is cured by the provision for de novo review by the Chancery Court which, in effect, retries the case upon the transcript of the Board hearing and such additional evidence as the Chancellor*

considers necessary." (Emphasis supplied) [Appendix B, pp. A-15-A-16.

In accordance with Section 49-5-513(i), Tennessee Code Annotated, Cooper appealed the Chancellor's decision to the Supreme Court of Tennessee. The Supreme Court of Tennessee filed its opinion on December 7, 1987, affirming the Chancellor's decision in part, vacating the Chancellor's decision in part, and remanding the case to the Chancellor for a new trial. The Chancellor was reversed, and the case remanded, due to his refusal to consider evidence regarding the truth of the charges themselves other than the evidence presented at the Board hearing. Thus, the Chancellor did not provide Cooper with a *de novo* hearing on the merits of the charges against him, as required by Section 49-5-513(g), Tennessee Code Annotated. *Cooper v. Williamson County Board of Education*, 746 S.W.2d 176 (Tenn. 1987) [Appendix C].

In affirming the Chancellor's dismissal of Cooper's due process claim, the Supreme Court of Tennessee stated:

> "Plaintiff also contends that he was denied due process because the Board was biased against him and had predetermined the outcome, acting in an arbitrary, capricious and unlawful manner in dismissing him. The Chancellor reasoned that the Teacher Tenure Act recognizes that members of a school board could be prejudiced against a teacher and that the Board would probably be aware of the situation before charges were formally brought and a hearing held, but any prejudice would be cured by a hearing *de novo* in the Chancery Court. Although we have determined that Plaintiff was not fully afforded a hearing *de novo* within the meaning of the Teacher Tenure Act, we nevertheless agree with the Chancellor on this aspect of the issue . . .
>
> * * *
>
> "Given the availability of a hearing *de novo* in these cases in which the Chancellor re-determines the merits of the charges and decides whether a Board's actions were justified by the evidence, we do not think that whether a Board acted arbitrarily or capri-

> ciously has any relevance to the status of the teacher because a hearing *de novo* in the Chancery Court readjudicates the matter in a neutral forum, completely eliminating any arbitrariness or capriciousness in the Board's decision, which is not afforded a presumption of correctness. Prejudice or bias would be relevant to impeach a Board member who testified but any arbitrariness or capriciousness on the part of the Board is cured by the hearing *de novo*." *Cooper v. Williamson County Board of Education, supra*, 746 S.W.2d at 183-84,

The case was tried again on remand on December 13 and 14, 1988, before the same Chancellor. Prior to the trial, the Chancellor sustained a motion in limine filed by the Board and thereby prohibited Cooper from offering evidence at the trial of bias on the part of Board members to support his constitutional claim [R. p. 5]. On January 24, 1989, the Chancellor issued another memorandum opinion, once again sustaining the Board's discharge of Cooper. [Appendix D].

Cooper again appealed to the Supreme Court of Tennessee. Relying upon this Court's holdings that an unconstitutional risk of bias in administrative adjudication is not created solely from the fact that an administrative body has been granted investigative as well as adjudicative functions, and relying on its own previous opinion regarding the curing effect of *de novo* review of the Board's decision, the Supreme Court of Tennessee rejected Cooper's due process claim and affirmed the decision of the Williamson County Chancery Court. [Appendix A, pp. A-5-A-6].

ARGUMENT

I. THE DECISION OF THE SUPREME COURT OF TENNESSEE IS IN CONFLICT WITH DECISIONS OF THIS COURT

> "To every trial lawyer a second trial of the same case is about a palatable as drinking cold soup. A *de novo* hearing does not suffice. There is no place in the law for a second table nor may we say to a [defendant], 'take an old cold tater and wait, we'll give you a fair trial on appeal.' " [The late Justice Joe Henry, writing for a majority of the Supreme Court of Tennessee in *State ex rel Anglin v. Mitchell*, 596 S.W.2d 779 (Tenn. 1980)].

A. A Tenured Teacher Is Entitled to a Meaningful Pre-Termination Hearing Before An Unbiased Tribunal.

A teacher who acquires tenure in accordance with the Tennessee Teacher Tenure Law thereby attains a property right in continued employment, of which he cannot be deprived absent due process of law. *Williams v. Pittard*, 604 S.W.2d 845, 849 (Tenn. 1980); *Sullivan v. Brown*, 544 F.2d 276 (6th Cir. 1976); *See also, Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). It is undisputed that Cooper was a tenured teacher at the time of his dismissal. He thereby possessed a constitutionally protected property interest in continued employment. At the moment when he was dismissed by the Board, he was deprived of his property interest. His continued employment ceased.

From the concise and limited statement of the case previously set forth, it is abundantly clear that the Board had decided to discharge Cooper long before it held the hearing in January and February, 1986. With full knowledge of the difficulties Cooper was having, the Board did nothing whatsoever to assist Cooper and instead did everything possible to insure his failure, rejecting its own attorney's suggestion for a committee to work with Fleming and Cooper, refusing to transfer teachers known to be fomenting unrest at the school, and ignoring Cooper's pleas to individual board members for help. Then, just five days after the Board's attorney gave the go-ahead in his November 20,

1985, memo, Board member Tom Gore moved for Cooper's immediate discharge. Cautioned by the Board's attorney that the Board must go through the procedural motions of a hearing, the Board amended Gore's motion to *direct* the Superintendent to bring charges seeking Cooper's dismissal. Moreover, with no charges pending against Cooper, the Board voted to pay $10,000.00 in attorneys fees for prosecution of the charges, whatever they might ultimately contain. The Board clearly had both a personal and financial stake in the decision it made on February 6, 1986. Cooper had obtained his position only after a long and bitterly fought suit against the Board, a Board with a "relatively recent history of discrimination." *See Cooper v. Williamson County Board of Education*, 587 F.Supp. 1082, 1092 (M.D.Tenn. 1983). Even after winning his suit in the face of "dogged opposition," Cooper obtained his position only when the Board was threatened with contempt. *See Cooper v. Williamson County Board of Education, supra*, 820 F.2d at 184 (Wellford dissenting). At least two Board members had openly urged their fellow Board members to discharge Cooper before dismissal proceedings were instituted, and another Board member had complained about being told by a federal court how to run the school system. On February 6, 1986, the Board fired Cooper on the charges it had demanded and for which it had paid.

In *Cleveland Board of Education v. Loudermill, supra*, this Court reviewed a decision by the Cleveland Board of Education to discharge a classified civil servant under Ohio law. Loudermill was not afforded an opportunity to respond to the charges against him or to challenge his dismissal. He appealed his dismissal to the Ohio Civil Service Commission, which held a hearing some 2 1/2 months after Loudermill had been discharged. After the Commission upheld the discharge, Loudermill filed a complaint in the United States District Court alleging that the procedure used to dismiss him was unconstitutional because it did not allow him an opportunity to respond to the charges against him prior to dismissal. The district court dismissed Loudermill's complaint because the procedures in the statute creating the property right were followed and Loudermill was, thus, afforded all the process due. The district court further found, as did the Supreme Court of Tennessee in this case, that post-termination remedies adequately protected Loudermill's constitutional rights. 470 U.S. at 536.

This Court, relying upon its earlier decision in *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 2 L.Ed.2d 113 (1971), held that a deprivation of property must be *preceded* by notice and an opportunity for a hearing appropriate to the nature of the case. This Court described as "the root requirement" of the due process clause that an individual be given an opportunity for a hearing *before* he is deprived of a significant property interest, noting that "the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect." 470 U.S. at 542, 543.

Moreover, because the pre-termination hearing is designed to serve as a "meaningful" opportunity to invoke the decision maker's discretion, the hearing must be more than simply a matter of form void of any real substance. Long before *Loudermill* was decided, this Court held that the fundamental requirement of due process was the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). An essential element of a hearing "in a meaningful manner" is the presence of an impartial decision maker. *Arnett v. Kennedy*, 416 U.S. 134, 198, 94 S.Ct. 1633, 30 L.Ed.2d 15 (1974); *Goldberg v. Kelly*, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 28777 (1970). In *Goldberg*, this Court concluded that the presence of an impartial decision maker at the pre-deprivation hearing was essential. 397 U.S. at 271. This Court has also recognized that the due process requirement of a fair hearing before a fair and impartial tribunal applies to administrative agencies which adjudicate as well as to the courts. *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975); *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 36 L.Ed.2d 488 (1973). Because the concern of due process is with the *fair* administration of justice, *Mayberry v. Pennsylvania*, 400 U.S. 455, 465, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971), a decision maker capable of making a fair and impartial decision is essential if a hearing is to be viewed as "meaningful."

This Court has discussed the need for a fair decision maker in dismissal proceedings involving tenured teachers on at least two occasions. In *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct.

1731, 20 L.Ed.2d 811 (1968), this Court indicated in dicta that the due process requirement of an impartial decision maker applied to school boards in dismissal proceedings involving tenured teachers when it stated:

> "Appellant requests us to reverse the state court's decisions upholding his dismissal on the independent ground that the procedure followed above deprived him of due process in that he was not afforded an impartial tribunal. However, appellant makes this contention for the first time in this Court, not having raised it at any point in the state proceedings. Because of this, we decline to treat appellant's claim as an independent ground for our decision in this case. *On the other hand, we do not propose to blind ourselves to the obvious defects in the fact-finding process occasioned by the board's multiple functioning vis-a-vis appellant.*" 391 U.S. at 578 n. 2 [Emphasis supplied].

Eight years later, this Court again addressed a claim of bias on the part of a school board in discharging a group of tenured teachers. *Hortonville Joint School District No. 1 . Hortonville Education Association*, 426 U.S. 482, 96 S.Ct. 2308, 49 L.Ed.2d 1 (1976). Although this Court rejected the due process claim in that case on the basis of a review of the facts, the Court nonetheless held that the Fourteenth Amendment would permit a court to strip a school board of its otherwise unremarkable power to discharge teachers if the Board's prior involvement in the case produced a bias rendering it unable to act consistently with due process. 426 U.S. at 494.

In *Loudermill*, this Court once again reaffirmed the due process requirement that a tenured teacher be provided a meaningful hearing *before* he is discharged. While this Court also held that "the formality and procedural requisites for the hearing" need only consist of notice to the teacher of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story, nothing in this Court's *Loudermill* decision can be read to dispense with the requirement that the hearing be conducted by a decision maker who is capable of rendering a fair decision. 470 U.S. at 454-46. Indeed, the procedural requisites for a *Loudermill* type hearing must

be viewed in the context of the purpose of the hearing, namely the provision to the tenured employee of a "*meaningful* opportunity to invoke the discretion of the decision maker." 470 U.S. at 543. Regardless of the procedures involved, a hearing must be meaningful to comport with due process. A hearing before a biased decision maker, where the outcome is predetermined, cannot satisfy the requirements of due process regardless of the formal procedures used.

B. The Availability Of A Post-Deprivation Hearing Does Not Cure A Failure To Provide A Pre-Deprivation Hearing.

Despite overwhelming authority requiring that a pre-termination hearing be conducted by an impartial decision maker, the Supreme Court of Tennessee held that the availability of *de novo* review in the Chancery Court cured any problems resulting from prejudice or bias on the part of the Board.[2] This holding ignores completely the due process requirement of a fair hearing before a fair and impartial tribunal at the administrative level. It is true that, under exceptional circumstances, a post-deprivation hearing may be sufficient to comply with the requirements of due process. *See Hudson v. Palmer*, 468 U.S.

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[2] It is true that the Supreme Court of Tennessee remarked at the end of its opinion that Cooper "had a meaningful hearing in a meaningful manner before an impartial tribunal in this case, both before the Board and in the *de novo* hearing before the chancellor and there was no violation of his right to due process." (App. A, p. A-6). However, it is apparent from the Court's reliance on *Withrow v. Larkin*, 421 U.S. 35 (1975), as well as its own previous decision in *Cooper v. Williamson County Board of Education*, 746 S.W.2d 176 (Tenn 1987), that this statement did not reflect any finding by the Court of a lack of bias on the part of the Board based upon the evidence in the record. Instead, the Supreme Court of Tennessee analyzed Cooper's due process claim solely in terms of whether the mere combination of investigative and adjudicative functions on the part of the Board was sufficient to disqualify the Board as a matter of due process, an issue addressed by this Court in *Withrow* and again in *Hortonville*. This reading of the Court's opinion is reinforced by a later decision of the Supreme Court of Tennessee in *Van Hooser v. Warren County Board of Education*, where the court once again relied on its initial decision in *Cooper* to reject another tenured teacher's claims that the Board had predetermined the outcome of her case. (Appendix G, pp. A-70-A-71).

517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). In these cases this Court has held that a post-deprivation remedy is adequate to satisfy the requirements of due process under circumstances where the property deprivation results from random and unauthorized acts which make the provision of pre-deprivation process impracticable. On the other hand, absent the necessity of quick action or the impracticality of providing any pre-deprivation process, this Court has held that a post-deprivation hearing is constitutionally inadequate to comply with the requirements of due process. *Zinermon v. Burch*, 494 U.S. __, 110 S.Ct. __, 108 L.Ed.2d 100, 118 (1990); *Logan v. Zimmerman Brush co.*, 455 U.S. 422, 436, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982). As this Court recognized in *Loudermill*, the discharge of a classified civil servant or tenured employee does not ordinarily present such exceptional circumstances as to alleviate the requirement for pre-deprivation process. 470 U.S. at 544-45. Under the Tennessee Teacher Tenure Law, the school system can avoid such exceptional circumstances, if necessary, by suspending the teacher pending final disposition of the case before the Board. Section 49-5-511(a)(3), Tennessee Code Annotated. *See Loudermill, supra*, 470 U.S. at 544-45. In Cooper's case, however, no suspension occurred, and Cooper continued to serve as principal of Fairview High School until the date of the Board's decision to discharge him. Moreover, contrary to the Chancellor's original opinion, nothing in the Tennessee Teacher Tenure Law precludes a biased Board member from disqualifying or recusing himself in a discharge proceeding.

Clearly, there were no circumstances present in this case which alleviated the due process requirement for a meaningful pre-deprivation hearing. This Court has repeatedly recognized that, absent such circumstances, even a temporary non-final deprivation of property without due process is constitutionally impermissible. *Loudermill, supra*, 470 U.S. at 544; *Fuentes v. Chevin*, 407 U.S. 67, 85, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Bell v. Burson*, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). As this Court held in *Fuentes*:

> "[N]o later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred." 407 U.S. at 82.

While it is true that a teacher under Tennessee's tenure scheme is entitled to *de novo* review of a board's decision to discharge him, that review is *de novo* only in the sense that the Chancellor decides the case anew and not in the sense that the slate is wiped clean. By the time the teacher appears before the trial court on *de novo* review, he is unemployed. While the board may bear the ultimate burden of proof upon review, the teacher has the burden of going forward with evidence sufficient to make a *prima facie* showing substantiating his claim that the Board's decision was erroneous. If the teacher fails to meet that burden, the Board need not do anything at all to substantiate the grounds for its decision. *Saunders v. Anderson*, 746 S.W.2d 185, 189-90 (Tenn. 1987). Thus, the teacher surely stands on different footing before the reviewing court than he did before the board. This sort of review, in the face of a deprivation of property without due process by the board, is constitutionally inadequate. *See Armstrong v. Manzo*, 380 U.S. 545, 551-52, 85 S.Ct. 1187, 15 L.Ed. 62 (1976).

A procedure is not constitutionally acceptable simply because an impartial adjudication is eventually offered on appeal. *Ward v. Village of Monroeville*, 409 U.S. 57, 61, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972). While this Court based its holding in *Loudermill* in part upon the provisions of state law for a full post-termination hearing, 470 U.S. at 546, *Loudermill* cannot be read to hold that the availability of such post-termination review cures any due process deprivations at the pre-termination hearing. Indeed, under Ohio's statutory scheme, the decision in *Loudermill* would have been largely unnecessary if that were the Court's holding. Moreover, while this Court specified the procedural requisites necessary in a pre-termination hearing for a tenured public employee, the result in *Loudermill* cannot be read to mean that pre-deprivation process is strictly a matter of form such that the fairness of the procedures used is irrelevant as long as judicial review is available. If the availability of judicial review means that a biased school board can sit in judgment at the pre-deprivation hearing as long as it follows the procedures outlined in *Loudermill*, then those

procedures are meaningless and of no consequence since they do not afford the teacher any meaningful opportunity to invoke the discretion of the decision maker prior to the deprivation.

II. A CONFLICT EXISTS AMONG THE FEDERAL COURTS OF APPEAL ON WHETHER THE PRESENCE OF A BIASED DECISION MAKER IS CURED BY THE AVAILABILITY OF POST-DEPRIVATION REVIEW.

Numerous Federal Courts of Appeal have recognized that post-deprivation remedies are not an adequate substitute for the meaningful pre-deprivation hearing required as a matter of due process. In *Beatrice Foods v. New England Printing*, 899 F.2d 1171 (Fed. Cir. 1990), the Court rejected the argument that a motion under Rule 59(e) of the Federal Rules of Civil Procedure for reconsideration of a decision on sanctions made without notice and an opportunity for a hearing would satisfy the requirements of due process. Relying on this Court's holdings in *Loudermill* and *Boddie*, the Court stated:

> "Nonetheless, reconsideration after a decision is rendered is not a substitute for a pre-decision hearing, when such hearing is otherwise required." 899 F.2d at 1177.

In *Staton v. Mayes*, 552 F.2d 908 (10th Cir. 1977), *cert. denied*, 434 U.S. 907, 98 S.Ct. 309, 54 L.Ed.2d 195, a school superintendent challenged his dismissal by the Board of Education where, prior to the Board hearing, several of the Board members had voiced their views that a new superintendent was needed. Although the Board members insisted at trial that they had reached their decision on the basis of the proof at the dismissal hearing, the Tenth Circuit held:

> "We are convinced that these established circumstances left no room for a determination that there was a decision by a fair tribunal, with the appearance of fairness, in view of the totality of these circumstances .... On the record as a whole, we are left with the firm conviction that this Board decision cannot stand and that a mistake was made in the ruling denying the due process claim." 552 F.2d at 914-15.

In *Miller v. City of Mission, Kansas*, 705 F.2d 368 (10th Cir. 1983), the Tenth Circuit once again held that where the testimony of members of a decision-making tribunal shows that those members had prejudiced minds before the beginning of the hearing, the hearing must be found to be unfair. 705 F.2d at 372.

In *Moore v. Warrick Public School District No. 29*, 794 F.2d 322 (8th Cir. 1986), the Eighth Circuit relied upon this Court's decision in *Harrah Independent School District v. Martin*, 440 U.S. 194, 99 S.Ct. 1062, 59 L.Ed.2d 248 (1979) (per curiam), for the conclusion that a teacher had a substantive due process right to be free from arbitrary and capricious Board action. 794 F.2d at 329. In *Matthews v. Harney County Oregon, School District No. 4*, 819 F.2d 889 (9th Cir. 1987), the Ninth Circuit reversed the District Court's grant of summary judgment in favor of the school district as to a discharged teacher's due process claims. Matthews had been discharged by the high school board and the elementary school board, and her discharge was subsequently upheld after evidentiary hearings before both boards. 819 F.2d at 891. In reversing the District Court's grant of summary judgment, the Ninth Circuit, relying on *Loudermill*, held that Matthews had stated a due process claim in connection with the failure of the school district to provide her a meaningful pre-termination hearing, regardless of the adequacy of the post-termination procedure she received after her dismissal. 819 F.2d at 892-93.

At least three Courts of Appeals have specifically held, contrary to the holding of the Supreme Court of Tennessee in this case, that the availability of post-deprivation remedies does not cure the due process deprivation where an employee with a property interest in continued employment is deprived of that interest in the absence of a meaningful pre-termination hearing. In *Shultz v. Baumgart*, 738 F.2d 231 (7th Cir. 1984), the Seventh Circuit held:

> "For purposes of remand, we note that if Shultz was indeed fired in violation of his due process rights, the availability of *post-deprivation* grievance procedures or a Board hearing would not have cured the violation. Shultz was entitled to notice and a meaningful opportunity to respond *before* he was terminated. If

> he was terminated without those protections, the constitutional deprivation was then complete." 738 F.2d at 327 [Emphasis in original].

Relying upon the Seventh Circuit's holding in *Shultz*, the First Circuit Court of Appeals rejected the argument that the availability of an administrative appeal after a school superintendent's discharge comported with the requirements of due process. *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 263 (1st Cir. 1987). Finally, in *Fetner v. City of Roanoke*, 813 F.2d 1183 (11th Cir. 1987), the Eleventh Circuit, reversing the dismissal of a due process claim arising out of the discharge of a police chief in the City of Roanoke, stated:

> "Post-deprivation remedies do not provide due process if pre-deprivation remedies are practicable.
>
> * * *
>
> Regardless of the existence of post-deprivation remedies, the allegation that defendants failed to accord Fetner even the most minimal process before he was fired raised a procedural due process claim under § 1983." 813 F.2d at 1186.

However, at least three circuits, including the Sixth Circuit which includes the state of Tennessee, have held that bias of a decision maker at the pre-termination level is irrelevant where post-deprivation remedies are available. In *Schaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1987), the Fifth Circuit applied this Court's rationale in *Parratt* and *Hudson* to reject Schaper's claims that he was deprived of due process in a pre-deprivation hearing because of bias on the part of the decision makers. However, the Fifth Circuit went beyond the *Hudson* and *Parratt* analysis, and further stated:

> "Nor does due process require the state to provide an impartial decision maker at the pre-termination hearing." 813 F.2d 715.

In *Garraghty v. Jordan*, 830 F.2d 1295 (4th Cir. 1987), the Fourth Circuit also rejected a due process claim due to bias on the part of the pre-deprivation decision maker. Relying on a narrow reading of this Court's *Loudermill* decision, the Court held:

> "Due process principles did not require that a neutral decision maker, rather than Jordan, make the decision to suspend Garraghty. A pre-deprivation proceeding need not be a full evidentiary hearing with witnesses and a neutral decision maker so long as the employee is given an opportunity to answer the charges." 830 F.2d at 1302.

See also Crocker v. Fluvanna County (VA) Board of Public Welfare, 859 F.2d 14, 17 (4th Cir. 1988).

Finally, in *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988) (en banc), the Sixth Circuit relied on *Garraghty* and *Schaper* for the conclusion that a discharged employee with a property interest in continued employment need not receive a pre-termination hearing before a neutral and impartial decision maker, since *Loudermill* only required a "right of reply" pre-termination hearing. The Sixth Circuit has followed this holding in at least two subsequent decisions. *See Cremeans v. City of Roseville*, 861 F.2d 878 (6th Cir. 1988); *Gillard v. Norris*, 857 F.2d 1095 (6th Cir. 1988).

In *Duchesne*, the Sixth Circuit acknowledged "that there may be cases . . . in which the supervisory official is so biased that the *Loudermill* 'right of reply' process is meaningless." 894 F.2d at 1008. However, the holding of the Sixth Circuit in *Duchesne*, as well as the holdings of the Fourth and Fifth Circuits in *Garraghty* and *Schaper*, respectively, permit just such a result. The same result is permitted, and indeed sanctioned, by the Supreme Court of Tennessee in this case.

This is not a case, like *Parratt* and *Hudson*, where the deprivation resulted from random and unauthorized conduct. The conduct in question, namely the action of the Board members in deciding to discharge Cooper in a case where the outcome was pre-determined due to the Board members' bias, is plainly authorized by the Tennessee Teacher Tenure Act. Indeed, the Chancellor acknowledged in his original opinion issued January 5, 1987, that the act presupposes this type of occurrence. Thus, this case does not require a *Hudson* and *Parratt* analysis.

Instead, this case represents an unduly restrictive reading of *Loudermill*, sanctioned by the Sixth Circuit in *Duchesne*, which effectively renders the requirement of a pre-termination hearing meaningless. As this Court noted in *Loudermill*, the pre-termination hearing serves as an initial check against mistaken decisions and an opportunity to present reasons why the proposed action should not be taken. 470 U.S. at 545-46. The pre-termination hearing is the tenured employee's meaningful opportunity to invoke the discretion of the decision maker. 470 U.S. at 543. Yet, having directed Fleming to seek Cooper's dismissal and having invested $10,000.00 to obtain the dismissal, and in the face of the history of the relationship between Cooper and the Board, it is clear that the Board was unwilling to consider any reason why its proposed action should not be taken and that Cooper's opportunity to respond "was nothing more than a sham." *Cremeans v. City of Roseville, supra*, 861 F.2d at 883.

The United States Court of Appeals for the District of Columbia has held that, where a disinterested observer can reasonably concludes that the administrative tribunal has in some measure judged the facts as well as the law of a particular case in advance of the hearing, due process requires that that tribunal be disqualified from deciding the merits of the controversy. *Cinderella Career & Finishing Schools, Inc. v. F.T.C.*, 425 F2.d 583, 591 (D.C. Circuit 1970). A similar result was reached by the Sixth Circuit in *American Cyanamid Company v. F.T.C.*, 363 F.2d 757, 767 (6th Cir. 1966). *See also Kendall v. Board of Education of the Memphis City Schools*, 627 F.2d 1 (6th Cir. 1980).

Yet, the most recent decisions of the Fourth, Fifth, and Sixth Circuits, as well as the decision of the Supreme Court of Tennessee in this case, clearly permit a biased administrative decision maker to decide the merits of a controversy involving constitutionally protected property interests. Under the decision of the Supreme Court of Tennessee in this case, bias on the part of the Board is irrelevant because *de novo* review purportedly cures any constitutional deprivation resulting from the presence of an impartial decision maker. Thus, a reviewing court which agrees with the Board's disposition of the charges effectively sanctions the Board's unconstitutional acts. This result-oriented approach, where the ends justify the means, is

contrary to the very essence of due process. The aim of due process is to prevent fundamental unfairness in the use of evidence, whether true or false. *Colorado v. Connelly*, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). As this Court unanimously held in *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988):

> "Where a person has been deprivated of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in this particular case due process of law would have led to the same result because he had no adequate defense upon the merits.' " 485 U.S. at 86-87 [quoting *Coe v. Armour Fertilizer Works*, 327 U.S. 413, 424, 35 S.Ct. 625, 59 L.Ed. 1027 (1915)].

The decision of the Supreme Court of Tennessee, like the decision of the Sixth Circuit in *Duchesne*, renders the due process guarantees of this Court's *Loudermill* decision meaningless and nothing more than a hollow and empty assurance. A pre-termination hearing can hardly serve any of the purposes envisioned in this Court's *Loudermill* decision where the decision maker has already determined the outcome before the hearing begins. A resolution of this issue is needed to end the disagreement among the circuits over whether this narrow reading of *Loudermill* is correct.

III. THE DECISION OF THE SUPREME COURT OF TENNESSEE HAS FAR-REACHING EFFECT.

The effect of the decision of the Supreme Court of Tennessee on Freeman Cooper is obvious. Cooper has been deprived of his property right in continued employment without due process as a result of his discharge by a biased school board. It has now been almost five years since his property was taken from him in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Tennessee has determined that his constitutional right to be free from an arbitrary deprivation of his property without due process is of no consequence.

However, the effect of this decision by the Supreme Court of Tennessee is not limited to Freeman Cooper. The determination by the Supreme Court of Tennessee that bias and prejudice on the part of a board in dismissing a tenured teacher can be cured by a post-termination hearing negates the due process guarantee of a meaningful pre-termination hearing entirely and renders that guarantee empty and unenforceable. This decision is a license to school boards to run roughshod over the constitutional rights of tenured teachers without fear of consequence. School boards, as well as other administrative bodies that adjudicate, need not provide any semblance of a meaningful hearing to those who appear before them, even where property rights protected by the Fourteenth Amendment are at stake.

This decision, like the recent decisions of the Fourth, Fifth and Sixth Circuits, strikes at the very heart of procedural due process. Under this decision, the *Loudermill* requirement of "meaningful" Board hearing no longer exists. The requirement of this Court in *Schweicker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665, 72 L.Ed.2d 1 (1982), that those who function in judicial or quasi-judicial capacities must be impartial as a matter of due process no longer exists. Contrary to this Court's decision in *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985), fundamental fairness of the procedure used to discharge tenured teachers in Tennessee does indeed turn on the result obtained in the individual case. 473 U.S. at 321. The effect of this decision, as well as similar decisions by the Fourth, Fifth and Sixth Circuits, is to render the guarantees of *Loudermill* a matter of form only. While procedural due process certainly involves form, a process devoid of substance or even a semblance of fairness cannot be viewed as "meaningful". The concern of due process is with *meaningful* procedures, not procedures as a matter of form only.

CONCLUSION

The decision of the Supreme Court of Tennessee in this case represents an extreme departure from numerous decisions of this and other courts. Yet, similar decisions by three Federal Courts of Appeal show that Tennessee has not traveled this ground alone. This due process issue is certain to arise countless more times as administrative bodies adjudicate matters involving property rights. Because of the significance and far-reaching effect of the constitutional question involved, and because of the disagreement among the circuits on this issue both before and since *Loudermill*, this Court should grant this petition for certiorari.

Respectfully submitted,

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Attorneys for Freeman Cooper,
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Dated at Nashville, Tennessee,
this 11th day of February, 1991.

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been placed in the United States Mail, first-class postage prepaid, addressed to Robert G. Wheeler, Jr., Esq., attorney for the Respondent, Suite 201, Bank of Goodlettsville, 112 Long Hollow Pike, P. O. Box 904, Goodlettsville, Tennessee 37072, phone no. 615-859-2500, the last address of Mr. Wheeler known to me, on this 11th day of February, 1991.

_____

W. Ovid Collins, Jr.

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

No. 89-36-I

Freeman M. Cooper,
Appellant,

vs.

Williamson County Board of Education,
Appellee.

Williamson Chancery
Hon. Henry Denmark Bell, Chancellor

For Appellant:
Charles Hampton White
Richard L. Colbert
Cornelius & Collins
Nashville, Tennessee

For Appellee:
Robert G. Wheeler, Jr.
Goodlettsville, Tennessee

FOR PUBLICATION

AFFIRMED COOPER, JUSTICE

OPINION

This is a direct appeal, under T.C.A. § 49-5-513(i), of a judgment of the Chancery Court of Williamson County terminating "Freeman M. Cooper's services as a teacher and as a principal of Fairview High School." Appellant insists the chancellor failed to review the evidence *de novo* as directed in this Court's opinion deciding issues in an earlier appeal of this case. *See Cooper v. Williamson County Board of Education*, 746 S.W.2d 176 (Tenn. 1987). Appellant also insists that the evidence preponderates against the chancellor's findings, that the findings do not justify his discharge as a tenured teacher and that the judgment deprives him of a property right without due process of law. We find no merit in any of the issues and, accordingly, affirm the judgment of the trial court.

Freeman Cooper was employed as a teacher in the Williamson County School System in 1965. In 1984, as the result of a judgment in the United States District Court for the Middle District of Tennessee, Cooper was appointed principal of Fairview High School. Kenneth Fleming, who assumed the office of Superintendent of Schools on September 1, 1984, soon became dissatisfied with Mr. Cooper's work performance and brought charges against Mr. Cooper before the Williamson County Board of Education. After a lengthy hearing, the Board dismissed the charges, directed Fleming to work with Cooper and that the two of them jointly prepare a Management Action Plan for the administration of Fairview High School, which identified the strengths and weaknesses of the administration of the school. The plan was due in two weeks and there was to be a written update every two months. From that time on, Mr. Cooper and Mr. Fleming recorded their meetings, or wrote summaries of conversations immediately after talking with each other. These tapes and summaries, which are in the record, formed the bases of reports required by the Board. They also provide a basis to refresh memories in the numerous instances when Mr. Fleming and Mr. Cooper differ as to what had occurred in their meetings.

In December, 1985, Mr. Fleming again brought charges against Mr. Cooper. Essentially, Mr. Cooper was charged with insubordination, incompetency, inefficiency and neglect of duties. Seventeen specific incidents were cited.[1] Following an exhaustive hearing on the charges, the Board found the specifications of fact in charges 1-6, 8, 12, and 14-17 were true and established instances of insubordination, incompetence, inefficiency and neglect of duty. The Board dismissed Mr. Cooper as an employee of the school system on February 7, 1986.

Cooper timely filed a petition in the chancery court to obtain judicial review of the Board's decision pursuant to T.C.A. § 49-5-513. Comparing his function in providing a *de novo* review of the Board's decision to that of the Court of appeals in reviewing the findings of a trial court in a non-jury case, the chancellor limited his review to an

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[1] See Appendix for charges and specifications filed against Mr. Cooper.

examination of the evidence presented to the Board in determining whether the evidence preponderated in favor of or against the determination of the Board. On finding that the evdence [sic] preponderated in favor of the Board's action, the chancellor entered a decree dismissing the action brought by Mr. Cooper.

On appeal, this Court held that the scope of review by the chancellor was too narrow, that it deprived Mr. Cooper of his statutory right to a hearing *de novo* under T.C.A. § 49-5-513(i), and vacated that part of the chancellor's decree dealing with the propriety of plaintiff's dismissal. The Court then remanded the case for a new hearing on the merits, with both parties having the right to introduce additional, noncumulative evidence on the issue of the propriety of the dismissal of Mr. Cooper from employment by the Williamson County School System. This Court affirmed the chancellor's findings that the Board had not violated the Tennessee Open Meetings Act, T.C.A. §§ 8-44-101, in discussing with its counsel legal ramifications of bringing charges against Mr. Cooper, or in discussing a settlement offer made by Mr. Cooper. This Court also considered Mr. Cooper's charge that the Board had acted in an arbitrary, capricious, and unlawful manner in hearing the charges against him and in dismissing him as an employee, and noted that:

> Given the availability of a hearing *de novo* in these cases in which the Chancellor redetermines the merits of the charges and decides whether a board's actions were justified by the evidence, we do not think that whether a board acted arbitrarily or capriciously has any relevance to the status of the teacher because a hearing *de novo* in the Chancery Court readjudicates the matter in a neutral forum, completely eliminating any arbitrariness or capriciousness in the board's decision, which is not afforded a presumption of correctness. 746 S.W.2d 176, 183-84.

On remand, without objection of the parties, the chancellor declined to consider charges against Mr. Cooper not proven in the initial hearing before the Board, leaving viable only those charges against Mr. Cooper that were the bases of his dismissal. As to these charges, the chancellor permitted the introduction of evidence, without regard to

whether the evidence was repetitive or cumulative to evidence introduced in the Board's hearing. The only limitation of the admission of evidence was that it be relevant to a pending charge. As a consequence, the chancellor had for consideration, the evidence of the hearing before the Board, the evidence introduced in a contempt proceeding filed by Mr. Cooper against the board in the United States District Court, and evidence introduced in the *de novo* hearing. The chancellor found from this that Mr. Cooper was guilty of the charges of insubordination, inefficiency, incompetence, and negligence, and that the Board was justified in dismissing Mr. Cooper as a tenured employee of the Williamson County School System.

Noting that the chancellor's findings on each of the controverted charges were the same as the Board's, and that no mention was made in the chancellor's memorandum opinion of rebutting evidence, plaintiff reasons that the chancellor did not try the case *de novo* as directed by this Court in the earlier appeal, but "plainly ignored the evidence, failed to make his own independent findings and conclusions and simply rubber-stamped the Board's decision, even though the evidence plainly weighed heavily against the decision." This argument, to have any justification, is dependent upon a finding that the evidence preponderates against the chancellor's findings; otherwise, the argument is a non sequitur. If properly considered, it is not unusual that two triers of facts will arrive at the same conclusion from the same evidence. And, from our review of the evidence, we are convinced that the findings of the chancellor, though the same as the Board, are in full accord with the preponderance of the evidence.

T.C.A. § 49-5-511(a)(2), speaking to dismissal or suspension of tenured teachers, specifically provides that a teacher may be dismissed for incompetence, or inefficiency, or neglect of duty, or unprofessional conduct, or insubordination. The chancellor found, and we agree, that the charges proven show insubordination, neglect of duty, incompetency, and inefficiency on the part of Mr. Cooper, as those terms are defined in T.C.A. § 49-5-501.

Plaintiff argues strenuously that the charges of which he stands convicted reflect only "upon his appointment as principal of Fairview

High School and his attempts to fulfill that appointment," and should not be the basis of his dismissal as a tenured teacher. We recognize that his dismissal as a school principal does not necessarily require his termination as a tenured teacher. *See Fleming v. Wade*, 568 S.W.2d 287, 289 (Tenn. 1978). But where, as here, the charges reflect adversely on plaintiff's ability to subject himself to the authority of superiors, and on his ability to perform work assignments in an efficient and competent manner, the charges properly can and should be the bases of his dismissal, both as a principal and as a teacher.

Plaintiff also argues that in these proceedings, he was deprived of his right to continued employment without due process in that he was not afforded a meaningful pre-termination hearing. Plaintiff argues that the superintendent of schools, who brought charges against plaintiff at the instigation of the school board, and the school board, who tried the charges, were biased. It is axiomatic that due process requires the opportunity of the party charged to be heard at a meaningful time and in a meaningful manner, before an impartial tribunal. *See Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482 (1976); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Withrow v. Larkin*, 421 U.S. 35, 46 (1975). But the mere fact that both investigative and adjudicative functions have been granted to an administrative body, in this case the school board, does not of itself create an unconstitutional risk of bias in an administrative adjudication. *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975), wherein the Court pointed out that

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a . . . difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators. . . .

Further, as noted in the earlier appeal of this case,

> Given the availability of a hearing *de novo* in [teacher tenure cases], in which the Chancellor redetermines the merits of the charges and decides whether a board's actions were justified by the

> evidence, we do not think that whether a board acted arbitrarily or capriciously has any relevance to the status of the teacher because a hearing *de novo* in the Chancery Court readjudicates the matter in a neutral forum, completely eliminating any arbitrariness or capriciousness in the board's decision, which is not afforded a presumption of correctness. Prejudice or bias would be relevant to impeach a board member who testified but any arbitrariness or capriciousness on the part of the board is cured by the hearing *de novo*. *Cooper v. Williamson County Board of Education*, 746 S.W.2d 176, 183-84.

In our opinion, without question, plaintiff had a meaningful hearing in a meaningful manner before an impartial tribunal in this case, both before the Board and in the *de novo* hearing before the chancellor and there was no violation of his right to due process.

Judgment of the trial court is affirmed. Costs of the appeal will be paid by plaintiff and his surety.

/s/ Robert E. Cooper, Justice

Concur:
Drowota, C.J.
Fones, Harbison,
and O'Brien, JJ.

APPENDIX

I, Kenneth L. Fleming, Superintendent of Williamson County Schools, do hereby charge Freeman M. Cooper, Principal of Fairview High School, with (A) insubordination, (B) incompetence, (C) inefficiency, (D) neglect of duty, and (E) conduct unbecoming a member of the teaching profession, all defined in T.C.A. § 49-5-501. These charges, all based upon incidents occurring after April 1, 1985, require the dismissal of Freeman M. Cooper as a teacher as defined in T.C.A. § 49-5-501.

A description of the evidence to support these charges follows.

1. Mr. Cooper has continually failed to comply in a timely manner with generally accepted rules of conduct regarding sick leave: Notification of illness to the employer, provision of a doctor's statement for extended illness, and provision of some indication of when the employee expects to return to work.

a. During extended periods of consecutive absences in April through June and in October and November, Mr. Cooper failed in a timely manner to provide adequate information regarding his illness, a doctor's statement, or a date of intent to return to work.

b. Superintendent Fleming asked Mr. Cooper on November 6 about whether he would be at work the next day, and Chairman Naron asked the same question of Mr. Cooper's doctor on night of November 6. Neither Mr. Cooper nor his doctor would provide any information as to whether Mr. Cooper would report to work the next day. Mr. Cooper failed to appear on November 7.

c. Mr. Cooper reappeared at work on November 18, having been absent since November 7 and having given no prior notice of when he would return. (A, B, C, D Note: Letters which follow each specification identify the statutory charges supported by the specification.)

2. On November 6, Superintendent Fleming questioned Mr. Cooper about the nature of his ailment, but Mr. Cooper refused to provide direct or complete answers. He continually responded to any questions

concerning his absences by stating only that his illness was not contagious and that the superintendent would receive a report from his doctor. (A, B, C, D)

3. Mr. Cooper continually failed to comply in a timely and efficient manner in the development of the Management Action Plan ordered by the Board on April 1.

Mr. Cooper promised on April 5 to provide by April 10 his written suggestions for the plan. On April 10 Mr. Cooper stated that the suggestions would be ready on April 11. Two days later he reported that he would submit them by the first of the next week. On April 15, Mr. Cooper's attorney stated that the draft would be submitted by April 24. On April 29, Mr. Cooper stated he would provide them within a few days. His suggestions were received on May 13.

Not until early June did Mr. Cooper agree to schedule a meeting with Superintendent Fleming to continue work on the plan. In response to requests from Superintendent Fleming on July 10 and July 19 urging Mr. Cooper to work with him to finalize the plan, Mr. Cooper notified Superintendent Fleming on July 25 of his understanding that the first phase of the plan had been finalized. However, Mr. Cooper then refused to sign the draft of the plan, which he had received on July 17, to certify that the plan had been mutually developed and that agreement had been reached. After minor changes, Mr. Cooper signed the plan on August 5. (A, B, C, D)

4. In October and November, Mr. Cooper violated Section I, B, 4, d, of the Management Action Plan which requires Mr. Cooper to have provided the Superintendent by October 14 a complete written report of his progress on the plan.

Reminders were sent to Mr. Cooper on October 14, October 22, October 30 and November 4 stressing the need for his written report and the need to meet with Superintendent Fleming to discuss it prior to its presentation to the Board; however, not until November 27 (after he had read it to the Board on November 25) did Mr. Cooper send what he now claims to have been his report on the plan. On November 6, Mr. Cooper had represented to Superintendent Fleming that his press

release to the *Tennessean* constituted his report on the plan. (A, B, C, D, E)

5. Mr. Cooper violated the line organization provisions described in the introduction to the Management Action Plan when he personally delivered to the offices of the Nashville *Tennessean* on October 26 a news release and granted an interview regarding his complaints about the superintendent's treatment of him concerning the plan. (A, B, C. D)

6. On August 7, August 20, September 23, September 24, October 9, October 18, October 22, October 25, November 6, November 11, and November 18, Mr. Cooper was directed by Superintendent Fleming to provide to the Fairview High School faculty and staff copies of the Management Action Plan, because several of its provisions apply to them. During a grievance meeting on October 8, Mr. Cooper acknowledged that he had promised to comply, but he stressed that he had not "promised to do it tomorrow." He distributed copies of the plan to his faculty on November 19. (A, B, C. D)

7. On October 8, Mr. Cooper cited his receipt of three to ten anonymous 'phone calls as a basis for accusing one of his secretaries, Robbie Hirsbrunner, who had filed a complaint against him, of being disloyal. This violates Section I, B, 3, c, of the plan which requires that Mr. Cooper act on complaints against his staff members only when the complainant is willing to give his name. (A, B, C, D)

8. On October 9, Mr. Cooper repeatedly refused to state whether he would comply with Superintendent Fleming's directive that Mr. Cooper remove his letter of reprimand from teacher Jan Daugherty's file and that he not allow the letter or her grievance regarding it to influence his evaluation of her performance as a teacher.

On October 10, Superintendent Fleming directed Mr. Cooper to give written notice by October 16 of whether he intended to comply with the October 9 directive. Mr. Cooper failed to reply, and Superintendent Fleming reminded him of the original directive on October 22. On October 25 Mr. Cooper stated that he had not decided whether to comply with directive but that he would inform the Superintendent's

office within ten days. On November 6, Mr. Cooper said he still had not decided whether to comply with the directive. On November 18, Mr. Cooper stated that he had removed the letter of reprimand from the teacher's file and that he had never planned to make the letter a factor in her evaluation. Mr. Cooper directly refused on November 18 to answer the superintendent's question of why Mr. Cooper had failed to tell him from the beginning that he had never intended to make the letter a factor in Mrs. Daugherty's evaluation. (A, B, C, D)

9. Mr. Cooper again violated Section I, B, 4, of the Management Action Plan when on September 16 he responded to Superintendent Fleming's September 6 offer to help him with the Jan Daugherty grievance by stating that he was not aware that he needed to seek the Superintendent's help with such matters. (A, B, C, D)

10. Mr. Cooper promised on July 24 to comply with a directive that he supply to Doug Crosier a copy of a tape recording Mr. Cooper had made of his conference with Mr. Crosier. Mr. Cooper stated at a Board meeting on August 5 that he had destroyed the tape. (A, B, D, D, E)

11. On August 5, Mr. Cooper violated Section I, B, 3, e, of the plan which emphasizes that Mr. Cooper provide specific written reasons for any staff transfer recommendations. That emphasis is consistent with provisions of newly adopted revisions in Article XV of the WCEA/ WCBE contract concerning involuntary transfers of professional personnel.

On May 13, Mr. Cooper submitted transfer recommendations which were not accompanied by specific reasons. Mr. Cooper reiterated his transfer recommendations on July 17, without specific reasons for each. On July 19 another directive was sent; however, Mr. Cooper replied on July 22, again without specific reasons. During a Central Office meeting on July 24 he specifically stated he would not comply with the directive that he provide specific reasons for his staff transfer recommendations. (A, B, C, D)

12. During a meeting in the Superintendent's office on April 5, Mr. Cooper repeatedly refused to state whether he would comply with the

directive that he recommend someone other than Roosevelt Harvey for a math vacancy at his school. (A, B, C, D)

13. Mr. Cooper refused on October 11 to schedule with Superintendent Fleming his initial evaluation conference. Superintendent Fleming communicated with him on October 18, October 22, October 25, November 6 and November 11 seeking unsuccessfully to schedule the evaluation conference. Mr. Cooper finally agreed to November 13, but his absences prevented the meeting until November 19. (A, B, C, D)

14. Mr. Cooper called his secretary, Robbie Hirsbrunner, into his office on August 30 and accused her of insubordination for having said within the hearing of a parent volunteer that he should let school office personnel know when he would be away from school. He also said her not putting "Mr." in front of his name on telephone notes showed insubordination and disrespect.

Upon receiving the copy Mrs. Hirsbrunner provided him of the complaint she filed with the Superintendent regarding this conversation, Mr. Cooper berated her saying that her filing a complaint showed disloyalty. (B, C)

15. Mr. Cooper, on August 26, issued a letter of reprimand to Jan Daugherty for having left school early the previous day. In leaving she had fully complied with the handbook Mr. Cooper issued to his teachers this year. Mr. Cooper did not discuss with Mrs. Daugherty the incident leading to the reprimand prior to issuing the letter. Furthermore, he made no attempt to resolve at the school level the grievance she filed about the letter. (B, C, D)

16. From April 1 through November 15, Mr. Cooper was absent from duty 67 work days. Based on the following factors, there is reasonable cause to conclude that Mr. Cooper's many absences were unnecessary.

(a) During his first series of consecutive absences, April 10 through June 5, Mr. Cooper never provided his employer with any information as to the nature of his illness. His doctor's letter states only that his doctor had ordered him to remain away from work.

(b) On June 6 Mr. Cooper violated his doctor's instructions not to return to work until after a re-examination. Reporting to a workshop at Brentwood High School on June 6, and all day every day for five consecutive work days was necessary if Mr. Cooper was to receive a $1,000 Career Ladder supplement from the State.

(c) On November 6, Mr. Cooper repeatedly refused to provide superintendent Fleming any information about the nature of his illness other than that his doctor would send a report and that he had nothing contagious.

(d) Mr. Cooper's doctor's letter, ultimately provided by Dr. Paul Alexander on November 16, states that all of Mr. Cooper's test results were within normal limits. The only basis Dr. Alexander cites for having ordered Mr. Cooper to remain off the job was Mr. Cooper's complaints about various aches and pains, not objective medical information.

(e) On October 20, Mr. Cooper notified Superintendent Fleming in a message left on his telephone answering machine that he was going to the doctor the next day because had an "almost blinding migraine." This was not one of the afflictions listed in Dr. Alexander's November 16 letter has having been one of Mr. Cooper's complaints.

(f) Mr. Cooper failed to cooperate in obtaining a second medical opinion on the status of his health. (A, B, C, D, E)

17. Robert Cullen, Personnel Director, wrote to Mr. Cooper on October 2 asking him to submit by October 16 a plan for removing waivers at his school next year for teachers teaching outside of their areas of certification. Mr. Cullen wrote to Mr. Cooper again on November 6 and on December 11. To date, Mr. Cooper has not supplied the requested plan. (A, B, C, D)

Respectfully submitted,

Kenneth L. Fleming
Superintendent
Williamson County Schools

APPENDIX B

IN THE CHANCERY COURT FOR
WILLIAKSON (SIC) COUNTY, TENNESSEE

NO. 17145

FREEMAN M. COOPER

VS.

THE WILLIAMSON COUNTY
BOARD OF EDUCATION

MEMORANDUM OF THE COURT

Following a hearing on written charges, the Williamson County Board of Education, hereinafter referred to as the "Board", dismissed Freeman Cooper, hereinafter referred to as "Cooper", from his position as Principal of Fairview High School and also dismissed him from his position as a tenured teacher in the Williamson County School System. Cooper has petitioned this Court pursuant to T. C. A. 49-5-513, for a de novo review. In the same petition Cooper seeks relief and sanctions under the Tennessee Open Meetings Act, T. C. A. 8-44-101, et seq. The Court is aware that the practice of combining an original claim with an appellate claim has been adversely criticized by the Middle and Western Sections of the Tennessee Court of Appeals. However, the Court believes that the problems inherent in such procedural mesalliance can be avoided in this case by dealing with the claims sequentially.

OPEN MEETINGS ACT CLAIM

Cooper was employed as a teacher in the Williamson County School System from 1965 until his dismissal on February 7, 1986. During 1984-85 and 1985-86 school years, Cooper served as Principal of Fairview High School and was a tenured teacher under the provisions of T. C. A. 49-5-501 et seq. In the summer of 1984 an employment discrimination suit brought by Cooper against the Board in the Federal District Court for the Middle District of Tennessee resulted in an order directing the Board to appoint Cooper as principal

of a high school in the Williamson County School System. The Federal District Court expressly retained jurisdiction of the case "to ensure full compliance with its judgment". There was no appeal from this Order and the Board proceeded to appoint Cooper Principal of Fairview High School. Subsequently motions have been filed by both Cooper and by the Williamson County School Superintendent, Kenneth Fleming, all of which motions were acted upon by the Federal District Court.

In November of 1984 Superintendent Fleming, hereinafter referred to as "Fleming", decided that he would submit charges against Cooper to the Board and seek Cooper's removal as a tenured teacher. Individual members of the Board became aware of Fleming's intentions. Several days before a regular meeting of the Board scheduled for January 7, 1985, as was his custom, Fleming delivered packets of written materials pertaining to the upcoming meeting. These packets contained the charges which he intended to present to the Board for its consideration at the January 7 session. Individual Board members had been calling the Board's attorney, Connie Clark, asking various questions about the legal implications and ramifications of dismissal proceedings against Cooper, particularly as related to the Federal District Court order. An informal meeting of the Board was arranged for January 6 at the suggestion of the Board's attorney so that she could answer cogent questions and render appropriate legal opinions without having to respond to the Board members individually. The Board chairman testified that there were sufficient members present to constitute a quorum, that the Board's attorney advised the members at the outset of the meeting with respect to the limitations imposed on such non-public meeting by the Open Meetings Act. He further testified that no decision was made or agreed upon and that no discussions were had as to action which should be taken or agreed upon. Other Board members who were present testified to the same effect. As to his claim of violation of the Open Meetings Act, Cooper had the burden of proof by a preponderance of the evidence. There is no proof whatsoever that the gathering on January 6, 1985, was a "meeting" as defined by T. C. A. 8-44-102(c). The proof is entirely to the contrary of the proposition that a quorum of the Board convened

in order to make a decision or to deliberate toward a decision on any matter. The Court is further of the opinion that the January 6, 1985, meeting falls within the attorney-client exception as defined in *Smith County Education Association vs. Anderson*, 676 S.W.2d 328, 1984. Cooper contends that the exception does not apply because there was at the time of the meeting no present or pending litigation involving the Board. This Court is of the opinion that the Federal District Court case constituted pending litigation within the contemplation of the attorney-client exception. Fleming's charges were approved as to sufficiency by the Board at the January 7 meeting. On April 1, 1985, at the conclusion of the evidentiary hearing the Board dismissed the charges.

Subsequently at a regularly scheduled meeting on November 25, 1985, the Board directed Fleming to prepare new charges against Cooper. Fleming did prepare and file charges against Cooper covering the period from April 1, 1985, to November 25, 1985. These charges were approved by the Board as to sufficiency, if proved, at a regularly scheduled meeting on December 16, 1985. On December 4, 1985, the Board's attorney arranged a private meeting of the Board members for the purpose of informing the Board members that Cooper's attorney had submitted to the Board's attorney a proposal whereby Cooper would submit his resignation upon payment to him of a stipulated sum of money. Cooper's attorney requested that the offer not be made public. As in the case of the January 6 meeting all the testimony as to the December 4, 1985, meeting was that no decision was made and there was no discussion or deliberation toward any decision. The Court accordingly concludes, based on the failure of Cooper to prove that the gathering on December 4, 1985, constituted a "meeting" as defined by the Open Meetings Act and upon the basis of the attorney-client exception, that the December 4, 1985, gathering did not constitute a violation of the Open Meetings Act.

DUE PROCESS ISSUE

Cooper contends that several members of the Board which sat in judgment on the charges against him had decided before the hearing to vote for his dismissal from the school system. He contends that the Board as a whole demonstrated a bias in favor of his dismissal by

directing Fleming to prepare charges and providing payment of fees to Fleming's legal counsel. Cooper does not attack the constitutionality of T. C. A. 49-5-513. The thrust of his argument is that the asserted fact that this particular Board was not an impartial tribunal renders the Board's dismissal of him an arbitrary, capricious and unlawful act. The problem with this contention is that the Tennessee Teacher Tenure Law pre-supposes that the Board will have prior knowledge of the accusations against a tenured teacher, will have approved the charges as to sufficienty [sic], and may have participated directly or indirectly in the preparation and investigation of the charges. Nonetheless, the Teacher Tenure Act does require or permit the Board to recuse itself nor is a biased member required or permitted to recuse himself from the duty of hearing the evidence and passing judgment on the charges. The due process problem is cured by the provision for de novo review by the Chancery Court which, in effect, retries the case upon the transcript of the Board hearing and such additional evidence as the Chancellor considers necessary.

The evidence before the Court in this case consists of a verbatim transcript of the Board hearing together with video tapes of the entire Board hearing. A brief evidentiary hearing was held in this Court dealing primarily with the Open Meetings Act claim. In addition, the transcript of the contempt hearing in Federal District Court was made an exhibit and both parties were permitted to designate the testimony and exhibits which each party desired to have considered as evidence in this case.

The Court has undertaken to review the action of the Board de novo to determine if the evidence preponderates in favor of the findings and action of the Board. This Court is not certain as to whether or not under T. C. A. 49-5-513 the Board's findings and action are entitled to a presumption of correctness. Whatever the correct interpretation of the statute may be in that regard, this Court has in this case not accorded the Board's findings and action such presumption, even as to the credibility of witnesses. Such fully de novo review is possible without a full retrial in this case because of the orderliness of the proceedings before the Board and the availability of video tapes of excellent quality.

DE NOVO REVIEW

The thirteen charges sustained by the majority of the Board were legally sufficient, if proved, to justify Cooper's dismissal from the County School System upon grounds of insubordination, incompetence, inefficiency and neglect of duty. The legal justification of the charges is not disputed by Cooper in his pleadings or brief. Neither briefs nor oral argument of counsel for Cooper asserted that the evidence produced by Cooper was insufficient, if true, to require the conclusions reached by the Board. Counsel for Cooper in argument, insisted that it was of vital importance that this Court view the video tapes of the Board hearing because the case turns upon the credibility of the witnesses. The Court has viewed the video tapes of the Board hearing. Fleming's testimony was supported by much documentation. Fleming had routinely sent letters or memoranda to Cooper reciting the substance of conversations between Fleming and Cooper and communications from others concerning Cooper. Fleming had also routinely recorded on cassette tapes meetings between Fleming and Cooper. At pre-arranged meetings between Fleming and Cooper, Fleming normally arranged for one or more of the Board's staff members to be present. Cooper had complained to Fleming about the tape recordings of their meetings and having others present. Cooper's posture at the Board hearing, in the Federal Court contempt hearing, and before this Court has been that the comprehensive documentation prepared by Fleming was evidence in support of Cooper's contention that Fleming, aided and abetted by the Board, engaged in a course of harassment and oppressive conduct designed to unfairly cause his resignation or dismissal from the Williamson County School System. It is apparent that as of April 1, 1985, when the first charges were dismissed, at least two members of the Board and Fleming were convinced that Cooper had been guilty of misconduct which justified his removal from the county school system. Nonetheless, the factual content of the evidence presented by Fleming through his own testimony, documents, and the testimony of other witnesses, was not materially rebutted by Cooper's testimony. Cooper offered no other witnesses to rebut the evidence against him. Cooper's testimony was directed primarily at the motives of Fleming and the other witnesses against him who were described as

being "hostile". Cooper further testified that he had sensed that he was being "set up". From a review of the entire hearing the Court concludes that the evidence presented against Cooper was essentially unimpeached and unrebutted. To the extent there were discrepancies between Cooper's testimony and the testimony of witnesses against him as to factual matters, the Court concludes that the testimony of the witnesses in support of the charges was more credible.

This Court accordingly concludes that the evidence in support of the thirteen charges sustained by the Board preponderates in favor of the conclusions of the Board and that the action taken by the Board in dismissing Freeman Cooper from the Williamson County School System was therefore fully justified.

DECREE

It is accordingly ORDERED, ADJUDGED AND DECREED that all claims, original and appellate, asserted in this case by plaintiff Freeman M. Cooper against the Williamson County Board of Education be, and the same hereby are dismissed. Plaintiff Cooper will pay court cost for which execution may issue if necessary.

This 5th day of January, 1987.

/s/ illegible
Judge

CERTIFICATE

The undersigned certifies that she has sent a true and correct copy of the foregoing to Hon. Charles Hampton White, Attorney at Law, 18th Floor, Third National Bank Building, Nashville, Tennessee, 32719; to Hon . Robert G. Wheeler, Jr., Attorney at Law, Koger Executive Center, Brentwood, Tennessee, 37027, and to Hon. David King, Attorney at Law, Third Avenue, South, Franklin, Tennessee, 37064, by placing the same in the U. S. Mail, addressed as aforesaid, with sufficient postage attached thereto to carry the same to its destination, on this the 5th day of January, 1987.

/s/ illegible
Dep. Clerk and Master

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

S/C No. 87-29-I

FREEMAN M. COOPER,
Plaintiff-Appellant,

V.

THE WILLIAMSON COUNTY BOARD OF EDUCATION,
Defendant-Appellee.

FOR PUBLICATION
Filed December 7, 1987.

WILLIAMSON EQUITY
Hon. H. Denmark Bell, Chancellor

For Appellant:
Charles Hampton White
Richard L. Colbert
Cornelius & Collins
Nashville, Tennessee

For Appellee:
Robert G. Wheeler, Jr.
Brown, Brown, & White
Nashville, Tennessee

OPINION

AFFIRMED IN PART; VACATED
IN PART AND REMANDED.

DROWOTA, J.

This direct appeal, brought under the Teacher Tenure Act, T.C.A. §§ 49-5-501, *et seq.*, involves the dismissal of Plaintiff, Freeman M. Cooper, from his position as principal of Fairview High School by Defendant, Williamson County Board of Education (the Board). Due to certain procedural defects in the proceedings in the trial court, we have determined that the judgment of the Chancery Court for Williamson County must be partially vacated and the case remanded for a new hearing solely on the issue of Plaintiff's dismissal.

I.

The present posture and our disposition of this case make an extensive recitation of facts unnecessary, but a brief procedural history is useful. Plaintiff was employed as a teacher in the Williamson County School System in 1965. In 1984, as a result of a judgment of the Federal District Court for the Middle District of Tennessee, Plaintiff was appointed principal of Fairview High School for the 1984-85 school year. Over the course of the next two years, Plaintiff's performance became unsatisfactory and eventually the Superintendent of Schools, Kenneth L. Fleming,[1] brought charges against Plaintiff before the Williamson County Board of Education. Following an exhaustive hearing, the Board dismissed Plaintiff on February 7, 1986. Plaintiff subsequently filed a Petition in the Chancery Court for Williamson County on March 7, 1986, to obtain judicial review of the Board's decision pursuant to T.C.A. § 49-5-513.

On November 5, 1986, a hearing was held in Chancery Court in this case. At the beginning of the proceedings, the Chancellor stated that he had studied the Teacher Tenure Act and had concluded that

> "if we have, as I understand we have, a verbatim transcript of the hearing on the written charges before the School Board, at which both sides were represented by Counsel and witnesses were subject to examination and cross examination, that that is [a deposition], in the sense of the statute.
>
> "So that I can just order, and I do order that I'll hear this case on deposition, that being the transcript."

The Chancellor based his order on his construction of the statute as "a review statute", comparing his function in providing a *de novo* review of the Board's decision to that of the Court of Appeals in reviewing the findings of a trial court in a non-jury case under Rule 13(d), T.R.A.P. Although he did not attribute a presumption of correctness to the

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[1] Originally, Mr. Fleming was named in his official capacity as a party to this action but he was voluntarily dismissed from the suit by Plaintiff; the Chancellor entered an order to this effect on January 5, 1987.

findings and conclusions of the Board, he believed that his scope of review extended only to an examination of whether or not the evidence preponderated in favor of or against the determination of the Board. Plaintiff was precluded from presenting any additional, noncumulative evidence on the issue of the propriety of his dismissal and was limited to the introduction of evidence on whether the Board had violated the Tennessee Open Meetings Act, T.C.A. §§ 8-44-101, *et seq.* Plaintiff objected to this procedure, which limited the scope of review to the record made before the Board on the issue of his dismissal, but acceded to the order of the trial court. An offer of proof was, however, made by the Plaintiff.[2]

On January 5, 1987, the Chancellor filed his Memorandum Opinion in which he found that the evidence preponderated in favor of the Board's action in dismissing Plaintiff and he dismissed Plaintiff's suit. Notice of appeal was filed on January 30, 1987. We now partially vacate the judgment of the trial court because the procedure used to review the action of the Board is contrary to the requirements of the Teacher Tenure Act, unduly narrowing the scope of review and denying Plaintiff a hearing *de novo* of his dismissal by the Board.

II.

A.

The action of a school board in dismissing or suspending a teacher is an administrative decision. Absent a statute providing the scope and method of review of an action of an administrative body, the available method of review is by a common law writ of certiorari.

> "[The] cases, broadly speaking, recognize the distinction between the writ of certiorari as employed under the common law, for review of the legality of the action of a board or inferior tribunal as within its jurisdiction or powers, and the same writ authorized

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[2] We have reviewed these materials but, in view of our decision in this case, we do not find it appropriate to comment upon their contents or their relevance to any issues. Nevertheless, we note that the offer of proof was directed to the merits of Plaintiff's dismissal by the Board.

> by statute to be employed, in lieu of an appeal, to review and correct errors of fact and law committed by such inferior tribunal."

Anderson v. City of Memphis, 167 Tenn. 648, 652, 72 S.W.2d 1059, 1060 (1934). *Compare* T.C.A. § 27-8-101 (Supp. 1987) (common law writ of certiorari) *with* T.C.A. § 27-8-102 (Supp. 1987) (statutory writ of certiorari available in certain instances). *See also* T.C.A. §§ 27-9-101, *et seq.*: *Davison v. Carr*, 659 S.W.2d 361 (Tenn. 1983). Under the common law writ, the scope of review is generally limited to a determination of whether the administrative body acted within its jurisdiction, or acted arbitrarily, capriciously, or illegally. *See, e.g., Hayslip v. Bondurant*, 194 Tenn. 175, 250 S.W.2d 63 (1952); *City of Knoxville Board of Education v. Markelonis*, 62 Tenn. App. 181, 460 S.W.2d 362 (1969). The scope of review under the common law writ does not ordinarily extend to a redetermination of the facts found by the administrative body. As we observed in *Davison v. Carr, supra:*

> "Generally, under common law certiorari, the scope of review is limited to the record to determine as a question of law whether there is any material evidence to support the agency's findings. However, new evidence is admissible on the issue of whether the administrative body exceeded its jurisdiction or acted illegally, capriciously or arbitrarily."

659 S.W.2d at 363 (citations omitted). *Cf.* T.C.A. § 4-5-322(g) (Supp. 1987) (Review of administrative actions under Administrative Procedures Act). See generally Cantrell, *Review of Administrative Decisions by Writ of Certiorari in Tennessee*, 4 Mem. St. U. L. Rev. 19 (1973).

In contrast, statutory writs of certiorari may provide for some form of a trial *de novo*. "The meaning of 'trial de novo' in each statute is obviously dictated by the wording and context of the statute in which it appears and by the nature of the administrative body, decision and procedure being used." *Pledger v. Cox*, 626 P.2d 415, 416-417 (Utah 1981). *Cf. Griffitts v. Rockford Utility District*, 41 Tenn. App. 653, 298 S.W.2d 33 (1956). The Teacher Tenure Act expressly provides that

"[t]he hearing shall be de novo and may be on deposition and interrogatories, or on oral testimony." T.C.A. § 49-5-513(g). The statutory scheme involved in this case is more exacting and explicit in prescribing review of administrative actions of a school board than either the comparable section of the Administrative Procedures Act, T.C.A. § 4-5-322, or T.C.A. §§ 27-9-101, *et seq*. We conclude that these review provisions in the Teacher Tenure Act constitute a species of the statutory writ of certiorari.[3]

B.

One of the fundamental purposes of the Teacher Tenure Act is "to protect school teachers from arbitrary demotions and dismissals." *Snell v. Brothers*, 527 S.W.2d 115, 116 (Tenn. 1975) (citation omitted). To this end, when any tenured teacher is dissatisfied with the administrative decision of a school board regarding suspension or dismissal, the Teacher Tenure Act permits judicial review of the board's actions pursuant to T.C.A. § 49-5-513.[4] T.C.A. § 49-5-513(a) provides that a tenured teacher subject to dismissal or suspension by a school board "may obtain a judicial review by filing a petition in the chancery court of the county where the teacher was employed." The petition, to be filed within thirty days of the teacher's receipt of notice of the board's decision, "shall state briefly the issues involved in the cause, *the substance of the order of the board, or the respects in which the petitioner claims the order of the board is erroneous, and praying*

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[3]For example, T.C.A. § 57-5-109(d) (Supp. 1987) explicitly states that the review of administrative orders concerning beer permits is "by statutory writ of certiorari, with a trial de novo as a substitute for an appeal. . . ." A number of similar statutory provisions exists in this State. They clearly contemplate a broader scope of review than would otherwise be available under the common law writ of certiorari employed to review administrative decisions. Furthermore, this type of *de novo* review is distinguished from *de novo* appellate review.

[4] Transfers of tenured teachers are treated separately under this statutory scheme. *See* T.C.A. §49-5-510. *See also, e.g., Hyde v. Bills*, 696 S.W.2d 355 (Tenn. 1985) (*Per Curiam*); *McKenna v. Sumner County Board of Education*, 574 S.W.2d 527 (Tenn. 1978); *State v. Yoakum*, 201 Tenn. 180, 297 S.W.2d 635 (1956).

for an accordant review." T.C.A. § 49-5-513(b) (emphasis added). T.C.A. § 49-5-513(b) functions to place the board's decision before the Chancery Court for review. Under T.C.A. § 49-5-513(e), the filing of the petition for review suspends the board's order until a final determination of the propriety of the suspension or dismissal of the petitioner; however, the teacher does not "return to teaching pending final disposition of the appeal." If any defendant named in the petition desires to raise a defense, such defendant must file an answer within thirty days of the filing of the petition, absent a court ordered extension of time to file; the Chancery Court may permit intervenors and such amendments to the pleadings as in other cases governed by the Rules of Civil Procedure. Although T.C.A. § 49-5-513(b) contemplates a review of the board's decision, the Chancellor, ordinarily affording expedited treatment of these petitions, holds a "hearing [that] *shall be de novo* and may be on deposition and interrogatories, or on oral testimony." T.C.A. § 49-5-513(g) (emphasis added). Unlike T.C.A. § 49-8-304, which was construed in *Frye v. Memphis State University*, 671 S.W.2d 467 (Tenn. 1984), this statute does not require that the record of the proceedings before the school board be certified and transmitted to the Chancery Court and the express terms of the statute clearly permit presentation of evidence different from or in addition to the transcript of the proceedings before the school board, including oral testimony in the Chancery Court itself. Upon hearing the evidence and considering the arguments at the hearing *de novo*, the Chancellor must reduce findings of fact and conclusions of law to writing for the record. T.C.A. § 49-5-513(h). Appeal from the Chancellor's decision is directly to this Court, "where the cause shall be heard on the transcript of the record from the chancery court." T.C.A. § 49-5-513(i). This last provision stands in contrast to the more expansive scope of review contemplated by subsection (g) in the Chancery Court.

Although the statutes involved are somewhat different, this situation is similar to the situation in *Frye v. Memphis State University, supra*, which involved university faculty tenure under T.C.A. §§ 49-8-301, *et seq.*. In *Frye*, the Chancellor limited the review of the administrative decision to the record of the administrative hearing to determine whether the evidence preponderated in favor of the action

taken by the administrative body. Despite the fact that the applicable statute in *Frye* did require transcription and transmittal of a certified record of the administrative hearing, unlike the statute in the instant case, we nevertheless concluded that the Chancellor's action denied the plaintiff a substantive hearing *de novo*:

> "In our opinion this was error. 'De novo judicial review' in this statute and context means a new hearing in the chancery court based on the administrative record and any additional or supplemental evidence which either party wishes to adduce relevant to any issue. The Chancellor may, of course, confine new evidence to that which is truly supplemental or additional and is not required to hear all of the evidence anew if he does not find this necessary. Otherwise there would be little need for the administrative transcript. However, he may permit introduction of any and all evidence which he deems necessary to enable him to dispose of the issues presented."

671 S.W.2d at 469. In *Frye*, we compared the review provisions of T.C.A. §§ 49-8-301, *et. seq.*, to those in the Teacher Tenure Act, finding that T.C.A. §§ 49-8-301, *et seq.*, contained provisions that are "not as clear and specific" as those in the Teacher Tenure Act, and concluded in that case that

> "the General Assembly intended that there is a broad review in the chancery court with the right of the parties to offer additional evidence if desired. We do not believe that the General Assembly intended to confine review to the record made at the administrative level or to limit additional evidence at the chancery level only to alleged procedural irregularities or improprieties in the administrative process."

Id., at 470. Moreover, we explicitly noted in *Frye* that "[i]n the review of cases involving tenured public school personnel, new evidence is frequently introduced at the chancery level, and it is not confined to procedural issues only. *See Potts v. Gibson*, 225 Tenn. 321, 469 S.W.2d 130 (1971)." *Id.*, at 470, n. 3. *See also Davis v. Barr*, 646 S.W.2d 914, 918 (Tenn. 1983). Considering the purpose of the Teacher Tenure Act

as a whole, the intent of a *de novo* review in Chancery Court is to prevent irreparable harm to the rights of a teacher that can result from permitting a prejudiced school board to dismiss or suspend a teacher without effective judicial review of such action. As we recognized in *Potts v. Gibson, supra*, "[m]uch of the mischief which could result from the system is obviated by the right to a trial de novo. . . ." 225 Tenn. at 332, 469 S.W.2d at 135.

C.

Considering both the differences and similarities between the two statutory schemes in this case and in *Frye* and the result in *Frye*, we can only conclude that the scope of review afforded Plaintiff in the present case was erroneously narrowed in the Chancery Court. Consequently, the scope of review in the Chancery Court is not confined to a determination of whether the evidence preponderates in favor of the determination of the administrative board and no presumption of correctness attaches to the decision of the school board. The statute at issue does not attempt to limit the review in Chancery Court to the record before the school board and thus expansively provides that the hearing *de novo* "may be on deposition and interrogatories, or on oral testimony," T.C.A. § 49-5-513(g); these terms are used in their ordinary sense in this statute. We think that a hearing *de novo* requires the Chancellor to redetermine both the facts and the law from all the evidence before the court. While not fully analogous, this type of review is more akin to an appeal from General Sessions Court pursuant to T.C.A. § 19-1-118 than to the review of the findings of a trial court in a nonjury case by an appellate court under Rule 13, T.R.A.P. Under Rule 13, T.R.A.P., an appellate court does

> "not *try* a case *de novo* as does a Circuit Judge on an appeal from the General Sessions Court. In a *de novo trial* the Circuit Judge does not review the action of the General Sessions Judges and is not concerned with what took place in the General Sessions Court nor the propriety of the lower Court's action; and no presumption of correctness attaches to the General Sessions judgment. The matter is *tried* as if no other trial had occurred.

Hohenberg Bros. Co. v. Missouri Pacific Railroad Co., 586 S.W.2d 117, 119 (Tenn. App. 1979) (emphasis in original). Unlike the situation in an appeal to a court of record from General Sessions Court, which does not ordinarily preserve a record of its proceedings, a record of the hearing before the school board may be preserved and transmitted to the Chancery Court and this record can become a part of the evidence before the Chancellor.[5] We reiterate that a transcript of the board hearing is *not* required to be transmitted to the Chancery Court under the terms of this statute but we do not think any party is precluded from having such a record submitted to the Chancellor.

We think that review under T.C.A. § 49-5-513 manifestly requires the Chancellor to reconsider and redetermine all issues of fact as well as law as if no such determination had been previously made. T.C.A. § 49-5-513(h) requires the Chancellor to "reduce his findings of fact and conclusions of law to writing and make them parts of the record." A ruling that the evidence preponderates for or against the determination of the school board does not comply with this provision of the statute. In contrast, the review before this Court on direct appeal under T.C.A. § 49-5-513(i) is limited to the record made in the Chancery Court, making the distinction between a hearing *de novo* in that Court and the scope of *de novo* appellate review clear for the purposes of this statutory scheme.[6] As we stated in *Davis v. Barr, supra*, any deter-

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[5] If no record is preserved from the hearing before the school board or transmitted to the Chancery Court, then a complete hearing *de novo* is required in the Chancery Court as if no hearing had been held before the board and the case had originated in that court.

[6] Compare *de novo* review of sentences in criminal cases on appeal under T.C.A. 40-35-402(d) (Supp. 1987), which expressly provides that no presumption of correctness attaches to the sentence imposed by the lower court, with *de novo* appellate review under Rule 13, T.R.A.P., or with *de novo* appellate review in Workers' Compensation cases under T.C.A. § 50-6-225(e) (Supp. 1987), both of which attribute a presumption of correctness to the judgment below. In teacher tenure cases, this Court also conducts a *de novo* review on appeal but the Chancellor's decision is "accompanied by a presumption of correctness of his decree, unless the preponderance of the evidence is otherwise." *Williams v. Pittard*, 604 S.W.2d 845, 846 (Tenn. 1980) (citations omitted). *See also* Rule 13, T.R.A.P.

mination of whether or not a teacher should be dismissed, suspended, or reinstated "can only be made after a full evidentiary hearing on the merits, for we have in the pleadings before us disputed factual issues." 646 S.W.2d at 918. Under this statute, the Chancellor completely substitutes his judgment for that of the school board.

> "Contention is made by respondents that if petitioner's right to a hearing *de novo* is sustained the result will be that the Court must substitute its opinion for that of the Commissioner. Conceding this to be true the Court cannot escape its responsibility, unwelcome though it may be, when the statute commands it, as it does in the instant case. The only alternative would be to hold that [the statute] is meaningless."

Odle v. McCormack, 185 Tenn. 439, 453, 206 S.W.2d 416, 422 (1947).

D.

At the hearing before the school board, the burden of proof rests upon the party preferring the charges against the teacher. *Williams v. Pittard, supra*, 604 S.W.2d at 850. When a teacher dissatisfied with the administrative decision brings the board's action to the Chancery Court for judicial review, then the order of proof but not the burden of proof shifts. In the Chancery Court, the plaintiff's petition raises the issues for review, stating the substance of the board's actions and the errors made by the board in its decision, and thus the plaintiff must present a *prima facie* case to substantiate the allegations of the pleadings; however, the burden of proof regarding the charges against the teacher does not shift to the teacher and remains on the same party both before the board and in Chancery Court.[7] Since the hearing in Chancery Court is *de novo* and no presumption of correctness attaches to the board's decision, the burden remains on the party that bore it before the board but the order of proof is shifted under the statute to the party filing the petition for review because that party is challenging the

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[7] That party bearing the burden may choose to rely on the transcript of the hearing before the board and present any rebuttal necessary to the plaintiff's *prima facie* case.

validity of the administrative decision, the existence of which is clearly presumed by the terms of the statute. The plaintiff must, therefore, demonstrate the error in the board's action to satisfy the requirements of the statute. Once the plaintiff establishes a *prima facie* case, the defendant then bears the burden of showing that the action taken by the board is appropriate and that the evidence is sufficient to justify the board's action. The plaintiff may then have the opportunity to rebut any proof proffered by the defendant. As in any case, the Chancellor then entertains arguments and considers the evidence presented in Chancery Court to decide the issues raised on their merits to determine whether the board's action was justified. The statute clearly contemplates that the Chancellor afford the plaintiff a hearing *de novo* as if the Chancery Court were making the initial determination of the status of the teacher. *See Fleming v. Wade*, 568 S.W.2d 287 (Tenn. 1978).

III.

Plaintiff has raised several additional issues and, while we must partially vacate the judgment and remand this case for further proceedings to provide Plaintiff a hearing *de novo* as required by the statute, we have considered these remaining issues and have concluded that the judgment of the Chancery Court must otherwise be affirmed. We address these other issues briefly.

The Chancellor did permit Plaintiff to present evidence concerning certain alleged violations of the Tennessee Open Meetings Act, T.C.A. §§ 88-44-101, *et seq.*, and this issue cannot be tried again on remand. The Chancellor determined that an informal gathering attended by a quorum of the Board to consult with the Board's attorney concerning the legal ramifications of bringing charges against Plaintiff, in view of the possibility of being found in contempt of the standing Federal District Court order to reinstate Plaintiff as a principal to a county high school, and at which meeting no action was taken by the Board, was not a meeting within the meaning of T.C.A. § 8-44-102(e). Regardless, the Chancellor concluded that such a meeting would fall within the attorney-client exception established by *Smith County Education Association v. Anderson*, 676 S.W.2d 328 (Tenn. 1984), if it did constitute a meeting within the meaning of the statute. Subsequently,

the Board met with its attorney to discuss a settlement offer made by Plaintiff, whose attorney requested that this offer not be made public; the Board made no decision at this meeting and no preliminary deliberations were undertaken by the Board. The Chancellor applied the same rationale to this second meeting as he had to the first. We agree that the attorney-client exception would have application under these circumstances.

Plaintiff also contends that he was denied due process because the Board was biased against him and had predetermined the outcome, acting in an arbitrary, capricious and unlawful manner in dismissing him. The Chancellor reasoned that the Teacher Tenure Act recognizes that members of a school board could be prejudiced against a teacher and that the board would probably be aware of the situation before charges were formally brought and a hearing held, but any prejudice would be cured by a hearing *de novo* in the Chancery Court. Although we have determined that Plaintiff was not fully afforded a hearing *de novo* within the meaning of the Teacher Tenure Act, we nevertheless agree with the Chancellor on this aspect of the issue and have previously addressed the issue in *Potts v. Gibson, supra:*

> "It is inevitable that members of a school board should form an opinion, good or bad, of teachers and especially school principals within the system. And by reason of their official duties the members may possess valuable information either for or against individual members of the teaching and executive staff and consequently can offer valuable testimony at a disciplinary hearing before the board. Yet, the law makes no provision for a hearing before another tribunal. Much of the mischief which could result from the system is obviated by the right to a trial de novo conferred by [this statute]."

225 Tenn. at 332, 469 S.W.2d at 135.

Furthermore, a number of teacher tenure cases have referred to a plaintiff's contention that a board acted in an arbitrary, capricious, and unlawful manner in determining the propriety of a suspension or dismissal. *See, e.g., Fleming v. Wade, supra,* at 290; *Potts v. Gibson,*

supra, 225 Tenn. at 325, 469 S.W.2d at 134. Given the availability of a hearing *de novo* in these cases, in which the Chancellor redetermines the merits of the charges and decides whether a board's actions were justified by the evidence, we do not think that whether a board acted arbitrarily or capriciously has any relevance to the status of the teacher because a hearing *de novo* in the Chancery Court readjudicates the matter in a neutral forum, completely eliminating any arbitrariness or capriciousness in the board's decision, which is not afforded a presumption of correctness. Prejudice or bias would be relevant to impeach a board member who testified but any arbitrariness or capriciousness on the part of the board is cured by the hearing *de novo*. Raising this issue in the Chancery Court seems to be a holdover from petitions for the common law writ of certiorari but it is not generally appropriate under the Teacher Tenure Act, which permits review of the administrative decision by a species of the statutory writ of certiorari and contemplates a much broader scope of review both of facts and of law to decide the case on its merits.

IV.

Nothing in this opinion or in the Teacher Tenure Act's review provisions restrains the discretion of a trial court to control its proceedings and to prevent introduction of cumulative, repetitive, or irrelevant evidence. No conflict exists between the concept of a hearing *de novo* in this statute and the trial court's discretionary authority over the conduct of trials. "Manifestly, a trial Judge must have some control over the dispatch of business in his court, and some discretion respecting the number of witnesses he will hear upon a specific line of inquiry incident to a case." *Powers v. McKenzie*, 90 Tenn. 167, 182, 16 S.W. 559, 562 (1891). Where a record of the proceedings before the school board is preserved and submitted, the Chancellor considers this record as if the testimony or other evidence contained in it had been presented in Chancery Court. Nevertheless, the parties may supplement this record with additional evidence concerning the charges, may attack the credibility of witnesses before the board or in the Chancery Court, including the attempt to show the prejudice or bias of testifying board members, and may raise any additional issues justified by the

pleadings. In short, the parties may present such evidence relevant to a proper determination of the status of the tenured teacher and to a just disposition of the case *on its merits*.

> "On remand, the parties should be allowed to put on any additional or supplemental proof which they desire, relevant to any of the issues. The Chancellor should then review the administrative record [, if any,] and any additional evidence brought before him to determine the weight of evidence and its preponderance, including the credibility and veracity of witnesses."

Frye, supra, 671 S.W.2d at 470.

Having determined that the scope of review provided in the Chancery Court for Williamson County deprived Plaintiff of his statutory right to a hearing *de novo* under T.C.A. § 49-5-513, we are compelled to vacate the judgment of the Chancery Court in part. The remainder of the judgment, aside from the propriety of Plaintiff's dismissal, is hereby affirmed. Accordingly, the case is remanded for a new hearing on the merits. The costs of appeal are taxed equally between the parties; the balance of the costs abide the outcome on remand.

/s/ Frank F. Drowota, III, Justice.

Concur: Harbison, C.J.
Fones, Cooper and O'Brien, JJ.

APPENDIX D

IN THE CHANCERY COURT
FOR WILLIAMSON COUNTY, TENNESSEE

No. 17145

FREEMAN M. COOPER

vs.

THE WILLIAMSON COUNTY BOARD OF EDUCATION

MEMORANDUM

This case has been remanded for a rehearing in accordance with the opinion of the Tennessee Supreme Court. The evidence now before the court in this case consists of a verbatim transcript of the Board hearing together with video tapes of the entire Board hearing, the transcript of the contempt hearing in Federal District Court in 1986, and the additional testimony of witnesses and exhibits introduced by both parties on December 13-14, 1988.

The most accessible copy of the 17 charges made against Cooper by Fleming is Exhibit No. 59 to the December 13-14, 1988 hearing. The court finds that the specifications of fact are true and the facts so found establish instances of insubordination, incompetence, inefficiency and a neglect of duty as defined in T.C.A. 49-5-501; as follows:

Charge	Statutory Causes
No. 1	Incompetence, inefficiency, neglect of duty
No. 2	Insubordination, incompetence, inefficiency, neglect of duty
No. 3	Insubordination, incompetence, inefficiency, neglect of duty
No. 4	Insubordination, inefficiency, neglect of duty
No. 5	Insubordination

No. 6	Insubordination, incompetence, inefficiency, neglect of duty
No. 8	Insubordination, incompetence, neglect of duty
No. 12	Insubordination, incompetence, inefficiency, neglect of duty
No. 14	Incompetence
No. 15	Incompetence, inefficiency, neglect of duty
No. 16	Inefficiency, neglect of duty
No. 17	Insubordination, incompetence, inefficiency, neglect of duty

In reaching the foregoing conclusions the court is aware that failure or refusal to respond to unreasonable or discriminatory directions by superiors is not, by statutory definition, insubordination. The court also understands that conduct ordinarily demonstrating insubordination, incompetence, inefficiency and neglect of duty must be considered in the context of the facts and circumstances surrounding the conduct. This principle also applies to the determination as to whether the directions of the board and Fleming were unreasonable or discriminatory. The court finds that the Board's directions as to the development of and adherence to a management action plan were reasonable and not discriminatory under the circumstances of this case. Fleming routinely sent letters or memoranda to Cooper reciting the substance of conversations between Fleming and Cooper and communications from others concerning Cooper. Fleming had also routinely recorded on cassette tapes meetings between Fleming and Cooper. At prearranged meetings between Fleming and Cooper, Fleming normally arranged for one or more of the Board's staff members to be present. Cooper had complained to Fleming about the tape recordings of their meetings and having others present. Cooper's posture at the Board hearing, the Federal Court contempt hearing, and before this court has been that the comprehensive documentation prepared by Fleming was evidence in support of Cooper's contention that Fleming, aided and abetted by the Board, engaged in a course of harassment and oppres-

sive conduct designed to unfairly cause his resignation or dismissal from the Williamson County School System. Part of the context surrounding the conduct of the Board, Fleming and Cooper was the fact that Cooper's appointment by the Board as principal of Fairview High School was pursuant to orders of the Federal District Court. The possibility of contempt proceedings was justification enough for the Board's directions as to the management action plan and the comprehensive documentation by Fleming both of which might otherwise be seen as discriminatory.

Notwithstanding that this court has found facts establishing a legal basis for dismissal of Cooper, a tenured teacher, from the Williamson County School System, the court understands that it is within the discretion of the court, as it was within the discretion of the County Board of Education, not to dismiss Cooper from the Williamson County School System. In this connection the court has been influenced, among other things, by the evidence as to charge No. 16 both at the Board hearing and thereafter. Mr. Cooper was charged with insubordination, incompetence, inefficiency, neglect of duty, and conduct unbecoming a member of the teaching profession based upon the following specifications of fact.

> "16. From April 1 - November 15, Mr. Cooper was absent from duty 67 days. Based on the following factors, there is reasonable cause to conclude that Mr. Cooper's many absences were unnecessary.
>
> (a) During his first series of consecutive absences, April 10 - June 5, Mr. Cooper never provided his employer with any information as to the nature of his illness. His doctor's letter states only that his doctor had ordered him to remain away from work.
>
> (b) On June 6, Mr. Cooper violated his doctor's instructions not to return to work until after a re-examination. Reporting to a workshop at Brentwood High School on June 6 and all day every day for five consecutive work days was necessary if Mr. Cooper was to receive a $1,000.00 career ladder supplement from the state.

(c) On November 6, Mr. Cooper repeatedly refused to provide superintendent Fleming any information bout the nature of his illness other than that his doctor would send a report and that he had nothing contagious.

(d) Mr. Cooper's doctor's letter, ultimately provided by Dr. Paul Alexander on November 16, states that all of Mr. Cooper's test results were within normal limits. The only basis Dr. Alexander cites for having ordered Mr. Cooper to remain off the job was Mr. Cooper's complaints about various aches and pains, not objective medical information.

(e) On October 20, Mr. Cooper notified superintendent Fleming in a message left on his telephone answering machine that he was going to the doctor the next day because he had an "almost blinding migraine." This was not one of the afflictions listed in Dr. Alexander's November 16 letter as having been one of Mr. Cooper's complaints.

(f) Mr. Cooper failed to cooperate in obtaining a second medical opinion on the status of his health."

In defense of charge No. 16 at the Board hearing Mr. Cooper relied on the letters from Dr. Alexander to Fleming and upon his own testimony that he had aches and pains and that all of his absences from duty on work days were at the direction of his physician. Subsequently, during the course of the discovery process in the Federal Court contempt proceedings, additional facts were brought to light concerning the cause of Cooper's aches and pains. In May of 1985, Dr. Alexander, after having tests performed, concluded that there was no organic disorder causing the symptoms related to Dr. Alexander by Cooper. Dr. Alexander, a cardiologist, concluded that Cooper's symptoms were caused by the stress involved in his employment as a high school principal. At some time prior to May 1, 1985, Dr. Alexander had referred Cooper to Dr. Jordan, a psychiatrist, for evaluation and recommendations. Dr. Jordan in his May 1, 1985 report to Dr. Alexander opined that Cooper "has suffered an extreme amount of situational stress and anxiety for several months." Dr. Jordan recommended that Cooper be given an extended medical leave extending

to "at least July 1, 1985." Thereafter, Cooper's health improved until the beginning of the 1985 fall semester. In October 1985, Cooper was found by Dr. Alexander to again have the symptoms he had reported in the spring and again found no cause for his symptoms other than the stress of his employment. Dr. Alexander again referred Cooper to Dr. Jordan, who saw Cooper on November 5, 1985 and reported to Dr. Alexander on November 7, 1985 reaffirming his previous opinion as to the cause of Cooper's aches and pains and "emotional symptoms."

> "However, he indicates that he has an interest in removing himself from the school system as soon as possible. As you know he is an ordained minister in the African Methodist Episcopal Church and has pastored in the past. He says that he is going to contact his Bishop and make known his availability, such that, when he can be given an appointment which he feels is comfortable to his needs he will resign from the school system and go into an active fulltime ministry. He has indicated in interest in doing this as of the summer of 1986.
>
> * * * *
>
> I would certainly consider him to be unable to adequately and beneficially function in the current situation of his employment. I would deem his employment status now to be so psychosocially stressful that it would be in his best interest to be placed on long-term disability as he contemplates his future professional plans."
>
> (Collective Exhibit No. 49, December 14-15 hearing)

In November 1985 Cooper, through his attorney, was making a discreet offer to the Board by which he would trade away his right to be principal under the Federal Court Decree and his rights as a tenured teacher in exchange for a $150,000.00 payment. Thus did Freeman Cooper hatch a plot whereby he hoped to obtain substantial cash in exchange for leaving the Williamson County School System which he then intended to do in any event.

Based upon all of the foregoing the court concludes that Freeman M. Cooper's services with the Williamson County School System both as

a teacher and as the principal of Fairview High School should be terminated.

Solicitor for the Williamson County Board of Education will prepare and submit a decree in accordance with this memorandum and assessing Court costs against Freeman M. Cooper.

The memorandum will be filed and made a part of the record in this case but need not be copied on the minutes.

The 24th day of January, 1989.

/s/ Henry Denmark Bell
Judge

cx: Hon. Charles Hampton White
Attorney at Law
18th Floor, Third National Bank Building
Nashville, TN 37219

Hon. Robert G. Wheeler, Jr.
Attorney at Law
2917 Foster Creighton Drive
Nashville, TN 37204

APPENDIX E

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

NO. 89-36-I

FREEMAN M. COOPER,
APPELLANT

VS.

WILLIAMSON COUNTY BOARD OF EDUCATION,
APPELLEE

WILLIAMSON CHANCERY
HON. HENRY DENMARK BELL,
CHANCELLOR

For Appellant:
Charles Hampton White
Richard L. Colbert
Cornelius Collins
Nashville, Tennessee

For Appellee:
Robert G. Wheeler, Jr.
Goodlettsville, Tennessee

NOT RECOMMENDED FOR PUBLICATION

AFFIRMED COOPER, JUSTICE

ORDER ON PETITION TO REHEAR

A petition for rehearing has been filed on behalf of appellant, Freeman M. Cooper. After consideration of the petition, the Court is of the opinion that the petition is without merit. Accordingly, the petition is overruled at the cost of appellant.

/s/ Robert E. Cooper, Justice

Concur:
Drowota, C.J.
Fones, Harbison
and O'Brien, JJ.

APPENDIX F

TENNESSEE TEACHER TENURE ACT

49-5-412. Schools required to have principal.—Each school having nine (9) or more teachers shall have at least one (1) full-time supervising principal. [Acts 1986, ch. 696, § 1; 1988, ch. 465, § 1.]

PART 5—TEACHERS' TENURE

49-5-501. Definitions.—(a) As used in this part, unless the context otherwise indicates:

(1) "Abolition of position" means a regular bona fide elimination of a position for sufficient, just and nondiscriminatory reasons;

(2) "Board" means the local board of education holding jurisdiction in its respective territory. In the event that a school system operates without a board of education, the authority which performs the functions usually performed by a board shall be indicated by the word "board";

(3) "Conduct unbecoming to a member of the teaching profession" may consist of, but not limited to, one (1) or more of the following:

(A) Immorality;

(B) Conviction of a felony or a crime involving moral turpitude;

(C) Dishonesty, unreliability, continued willful failure or refusal to pay one's just and honest debts;

(D) Disregard of the code of ethics of the Tennessee Education Association in such manner as to make one obnoxious as a member of the profession; or

(E) Improper use of narcotics or intoxicants;

(4) "Incompetence" means being incapable, lacking adequate power, capacity or ability to carry out the duties and responsibilities of the position. this may apply to physical, mental, educational, emotional

or other personal conditions. It may include lack of training or experience; evident unfitness for service; physical, mental or emotional condition making teacher unfit to instruct or associate with children, or inability to command respect from subordinates or to secure cooperation of those with whom he must work;

(5) "Inefficiency" means being below the standards of efficiency maintained by others currently employed by the board for similar work, or habitually tardy, inaccurate, or wanting in effective performance of duties;

(6) "Insubordination" may consist of:

(A) Refusal or continued failure to obey the school laws of Tennessee, or to comply with the rules and regulations of the board, or to carry out specific assignments made by the board, the superintendent or the principal, each acting within its own jurisdiction, when such rules, regulations and assignments are reasonable and not discriminatory;

(B) Failure to participate in an in-service training program as set up by the local board of education and approved by the state board of education;

(C) Treason, any effort to sabotage or overthrow the government of the United States; or

(D) Refusal by the teacher to disclose to the board whether or not he is, or has been, a member of the Communist or any other party which advocates the overthrow of the government;

(7) "Neglect of duty" means gross or repeated failure to perform duties and responsibilities which reasonably can be expected of one in such capacity, or continued unexcused or unnecessary absence from duty;

(8) "Probation" is a condition and period of trial during which a teacher is under observation to determine his fitness for tenure status;

(9) "Superintendent" refers to the local superintendent of schools, or to any other officer performing the functions of a superintendent;

(10) "Teacher" includes teachers, supervisors, principals, superintendents and all other certificated personnel employed by any local board of education, for service in public, elementary and secondary schools in Tennessee, supported in whole or in part by state or federal funds;

(11)(A) "Limited tenure" is a form of tenure under which a teacher may have a position for a limited period of time and may extend his tenure for a like period of time by meeting certain requirements set forth in this part;

(B) "Permanent tenure" refers to a term and condition of tenure, extending from the time when the teacher acquires the status of permanent tenure until such time as the teacher arrives at the maximum age set forth in this part, resigns, retires or is dismissed under provisions of this part; and

(C) "Tenure" indicates the statutory requirements, conditions, relations and provisions in this part, under which a teacher employed by a board holds a position as a teacher under the jurisdiction of the board. Administrative and supervisory personnel shall have tenure as teachers and not necessarily tenure in the specific type of position in which they may be employed; and

(12) "Transfer" means removal from one (1) position to another position under jurisdiction of the same board.

(b) As used in this part, the personal pronouns he and she and their various forms shall be interpreted as being used in the generic sense and as referring to any teacher or other person regardless of sex. [Acts. 1951, ch. 76, § 1 (Williams, § 2345.1); Acts 1955, ch. 343, § 1; 1974, ch. 654, §§ 74-76; T.C.A. (orig. ed.), § 49-1401.]

49-5-502. Construction with other statutes.—(a) The Teachers' Continuing Contract Law, § 49-5-409, shall not be construed to be affected by the provisions of this part, except that the continuing contract law shall not apply to teachers who have acquired permanent or limited tenure under this part.

(b)(1) This part shall not affect the operation of local or private tenure acts in operation on March 1, 1951, applying to counties, municipalities or special school districts.

(2) This part shall not be operative in any such county, municipality or special school district so long as such local or private act remains in effect.

(3) This part shall become operative in any system where there is, on March 1, 1951, a local tenure law in effect, if and when the local law becomes inoperative. [Acts 1951, ch. 76, §§ 14, 18 (Williams,m §§ 2345.14, 2345.18); modified; T.C.A. (orig. ed.), §§ 49-1418, 49-1419.]

49-5-503. Types of Tenure.—There are two (2) types of tenure for teachers who are now or hereafter employed in the public schools, as follows:

(1) "Limited tenure" shall apply to any teacher who is not classified as having "permanent tenure," but who, prior to September 1, 1972:

(A) Has completed two (2) years of college (but less than bachelor's degree), and holds a valid professional license covering the grades or subjects taught, or holds a valid examination license covering the grades or subjects taught regardless of the number of years of college completed:

(B) Completes a probationary period of three (3) school years or not less than twenty-seven (27) months within a five-year period, the last school year to be as a regularly employed teacher; and

(C) Is then reemployed by the board for service after the probationary period and maintains continuous "limited tenure" status thereafter, and

(2) "Permanent tenure" applies to any teacher who:

(A) Has a degree from an approved four-year college or to any vocational teacher who has the equivalent amount of training established and licensed by the state board of education;

(B) Holds a valid professional license based on training covering the subjects or grades he is teaching;

(C) Has completed a probationary period of three (3) school years or not less than twenty-seven (27) months within the last five-year period, the last year to be employed as a regular teacher;

(D) Is reemployed by the board for service after the probationary period. [Acts 1951, ch. 76, § 3 (Williams, § 2345.3); modified; Acts 1971, ch. 22, §§ 1, 2; 1977, ch. 33, § 1; T.C.A. (orig. ed.), § 49-1402; Acts 1987, ch. 308, § 25.]

49-5-504. Probation.—(a) Any teacher, otherwise qualified for "permanent tenure" status or "limited tenure" status shall serve three (3) years or not less than twenty-seven (27) months within a five-year period as a probationary teacher before acquiring "permanent tenure" status or "limited tenure" status.

(b) Upon completion of the probationary period, any teacher who is reemployed or retained in the system is entitled to the tenure status for which he is qualified by college training and licensing; provided, that the superintendent shall notify the board prior to reelection by the board that the teacher, if reelected, will attain tenure status.

(c) Time spent on leave of absence, except sick leave as provided in § 49-5-710, shall not be counted as a part of the probationary period. [Acts 1951, ch. 76, §§ 4, 8 (Williams, §§ 2345.4, 2345.8); Acts 1965, ch. 195, § 1; 1973, ch. 298, § 1; T.C.A. (orig. ed.), §§ 49-1403, 49-1406; Acts 1987, ch. 308, § 26.]

49-5-505. Limited tenure.—(a) "Limited tenure" status shall be for a period of three (3) years. Acquiring not less than eighteen (18) quarter hours of college credit during the three-year period of "limited tenure" entitles the teacher to renewal of his tenure status, and upon receiving proper statement from the college, verifying credits received, the board shall extend the teacher's tenure status for another three-year period.

(b) A limited tenure teacher shall become a permanent tenure teacher when he earns a bachelor's degree and has otherwise complied with the provisions of this part.

(c) When a teacher on "limited tenure" fails, during any three-year period, to meet the foregoing requirements of acquiring at least eighteen (18) quarter hours' credit, he shall automatically lose his "limited tenure" status and shall not be eligible to again attain "limited tenure" status in any local school system.

(d) Only those teachers who have attained "limited tenure" status prior to September 1, 1972 and who continuously maintain the requirement of this section shall be covered by the provisions of this section.

(e) The superintendent of each county, city and special school system shall establish a roster of "limited tenure" teachers in his respective school system as of September 1, 1972, and shall provide a copy of the roster to the commissioner of education and notify each person on the roster, prior to December 31, 1972, of the provisions pertaining to retaining "limited tenure" status. [Acts 1951, ch. 76, § 5(Williams, § 2345.5); Acts 1967, ch. 195, § 1; Acts 1971, ch. 22, §§ 3, 4; 1974, ch. 654, § 77; T.C.A. (orig. ed.), § 49-1404.]

49-5-506. Local standards may apply.—The local board of education shall have authority to set standards of employment or to maintain educational requirements of the personnel in service over and above those required by the state board of education whenever the board is in a position to support the superior program; provided, that such requirements are general in their application and have the approval of the state board of education. [Acts 1951, ch. 76, § 13 (Williams, § 2345.13); Acts 1961, ch. 226, § 1; 1963, ch. 236, § 1; T.C.A. (orig. ed.), § 49-1405.]

49-5-507. Retirement age.—A teacher's tenure status shall terminate as of July 1, following the sixty-fifth anniversary of his birth. [Acts 1951, ch. 76, § 12 (Williams, § 2345.12); Acts 1961, ch. 226, § 2; 1963, ch. 236, § 2; T.C.A. (orig. ed.), § 49-1407.]

49-5-508. Breach of contract—Effect on tenure.—(a) A teacher shall give the superintendent notice of resignation at least thirty (3) days in advance of the effective date of the resignation. A teacher who fails to give such notice, in the absence of justifiable mitigating circumstances, shall forfeit all tenure status under this part; provided, that the board may waive the thirty (30) days' notice requirement and permit a teacher to resign in good standing.

(b) Any teacher who breaks a contract with a board of education without a justifiable reason as listed in this section shall not be given permanent tenure status in any other school system in this state until such teacher has met all of the requirements in such system for attaining such permanent status plus the serving of five (5) continuous years in lieu of the three (3) continuous years required in § 49-5-503; provided, that the local board of education against which such teacher has broken a contract informs the commissioner of education of such breach of contract and requests him to so notify all local boards of education in this state. Such local board of education may later inform the commissioner that it is no longer holding the breach of contract against the teacher, in which event such local board of education shall request the commissioner to so notify all local boards of education in this state. If and when such local board of education informs the commissioner that it is no longer holding the breach of contract against the teacher, the penalty in this subsection against such teacher shall immediately become ineffective, null and void.

(c) The conditions under which it is permissible to break a contract with a local board of education are as follows:

(1) The incapacity on the part of the teacher to perform the contract as evidenced by the certified statement of a physician approved by the local board of education;

(2) The drafting of the teacher into military service by a selective service board; or

(3) The release by the local board of education of the teacher from the contract which the teacher has entered into with such local board

of education. [Acts 1951, ch 76, § 9 (Williams, § 2345.9); Acts 1961, ch. 226, § 3; 1974, ch. 654, § 78, T.C.A. (orig. ed.), § 49-1408.]

49-5-509. Teacher transferred to another system.—Tenure teachers moving to another system shall serve the regular probationary period in the new system. The local board of education, upon the recommendation of the superintendent, may waive this requirement and grant tenure or shorten the probationary period, as it sees fit. [Acts 1951, ch. 76, § 11 (Williams, § 2345.11); T.C.A. (orig. ed.), § 49-1409.]

49-5-510. Transfers within system.—The superintendent, with the approval of the board, when necessary to the efficient operation of the school system, may transfer a teacher from one (1) location to another within the school system, or from one (1) type of work to another for which he is qualified and licensed. Such a transfer can be made only by the concurrent action of the superintendent and the board. [Acts 1951, ch. 76, § 10 (Williams, § 2345.10); Acts 1957, ch. 202, § 1; 1965; ch. 196, § 1; 1969, ch. 286, § 1; 1970, ch. 480, § 1; T.C.A. (orig. ed.), § 49-1411; Acts 1987, ch. 308, § 27.]

49-5-511. Dismissal or suspension of teachers generally.—(a)(1) No teacher shall be dismissed or suspended except as provided in this part.

(2) The causes for which a teacher may be dismissed are as follows: incompetence, inefficiency, neglect of duty, unprofessional conduct and insubordination as defined in § 49-5-501.

(3) A superintendent may suspend a teacher at any time that may seem necessary, pending investigation or final disposition of a case before the board or an appeal. If the teacher is vindicated or reinstated, he shall be paid the full salary for the period during which he was suspended.

(4) When charges are made to the board of education against a teacher, charging the teacher with offenses which would justify dismissal of the teacher under the terms of this part, the charges shall be made in writing, specifically stating the offenses which are charged, and shall be signed by the party or parties making the charges.

(5) If in the opinion of the board, charges are of such nature as to warrant the dismissal of the teacher, the superintendent shall give the teacher a written notice of this decision, together with a copy of the charges against him, and a copy of a form which shall be provided by the commissioner of education advising the teacher as to his legal duties, rights and recourse under the terms of this part.

(b)(1) When it becomes necessary to reduce the number of teaching positions or nonlicensed positions in the system because of a decrease in enrollment or for other good reasons, the board shall be empowered to dismiss such teachers or nonlicensed employees as may be necessary.

(2) The board shall give the teacher or nonlicensed employee written notice of dismissal explaining fully the circumstances or conditions making the dismissal necessary.

(3) A tenure teacher who has been dismissed because of abolition of position shall be placed on a preferred list for reemployment in the first vacancy he is qualified by training and experience to fill. Nothing in this subsection shall be construed to deprive the board of the power to determine the fitness of such teacher for reemployment in such vacancy on the basis of the board's evaluation of such teacher's competence, compatibility and suitability to properly discharge the duties required in such vacancy considered in the light of the best interest of the students in the school where the vacancy exists. [Acts 1951, ch. 76, §§ 2, 6, 7, 15 (Williams, §§ 2345.2,, 2345.6, 2345.7, 2345.15); Acts 1955, ch. 343, § 2; T.C.A. (orig. ed.),, §§ 49-1410, 49-1412 — 49-1415; Acts 1989, ch. 197, § 1; 1990, ch. 948, § 23.]

49-5-512. Dismissal or suspension — Hearing. (a) A teacher, having received notice of charges against him, may within thirty (30) days after receipt of notice, demand a hearing before the board as follows:

(1) The teacher shall give written notice to the superintendent of his request for a hearing;

(2) The superintendent shall, within five (5) days after receipt of request, indicate the place of such hearing and set a convenient date,

which date shall not be later than thirty (30) days following receipt of notice demanding a hearing;

(3) The teacher may appear at the hearing and plead his cause in person or by counsel;

(4) The teacher may present witnesses, and shall have full opportunity to present his contentions and to support them with evidence and argument;

(5) The chairman of the board conducting the hearing is hereby empowered to issue subpoena for witnesses to compel their attendance at hearings authorized under this section. All parties to the proceeding shall have the right to have subpoenas issued by the chairman of the board to compel the attendance of all witnesses deemed by such parties to be necessary, for a full and compete hearing. All witnesses shall be entitled to the witness fees and mileage provided by law for legal witnesses, which fees and mileage shall be paid as a part of the costs of such proceeding. The costs of such proceeding shall be paid by the losing party;

(6) The chairman of the board shall administer oaths to witnesses, who shall testify under oath;

(7) On request of either party to the trial, witnesses may be barred from the hearing except as they are called to testify. The hearing may be private at the request of the teacher or in the discretion of the board; and

(8) The board shall within ten (10) days decide what disposition to make of the case and shall immediately thereafter give the teacher written notice of its findings and decision.

(b) The superintendent or other school officials shall not be held liable, personally or officially, when performing their duties in prosecuting charges against any teacher or teachers under this part. [Acts 1951, ch. 76, § 16 (Williams, § 2345.16); Acts 1972, ch. 588, § 1; T.C.A. (orig. ed.), § 49-1416.]

49-5-513. Judicial review.—(a) A teacher under "permanent tenure" or "limited tenure" status who is dismissed or suspended by action of the board may obtain a judicial review by filing a petition in the chancery court of the county where the teacher was employed.

(b) The petition shall be filed within thirty (3) days from the receipt by the teacher of notice of the decision of the board. The petition shall state briefly the issues involved in the cause, the substance of the order of the board, or the respects in which the petitioner claims the order of the board is erroneous, and praying for an accordant review. The petition shall be addressed to the presiding chancellor and shall name as defendants the members of the board and such other parties of record, if such, as were involved in the hearing before the board.

(c) The petitioner shall give bond for costs as in other chancery suits or oaths of pauperis in lieu.

(d) Upon the filing of the petition, the clerk and master shall immediately send, by registered return receipt mail, to the chairman of the board, a notice of the filing of the petition and a certified copy thereof. The clerk shall also send a similar notice to the last known post office address of each other party named as defendant. In lieu of notice by registered mail, subpoena to answer may be served personally on each defendant, as in other chancery cases.

(e) The filing of such petition shall suspend the order of the board pending a decision by the chancellor, but the teacher shall not be permitted to return to teaching pending final disposition of the appeal.

(f) All defendants named in the petition, desiring to make defense, shall do so by answer (in which grounds of demurrer shall be incorporated) to the petition within thirty (30) days from the date of the filing of the petition, unless the time to be extended by the court. Any other person who may be affected by the decision to be made by the court may, upon proper leave given, intervene and file an answer in the cause. Amendments may be granted as in other chancery procedure.

(g) The cause shall stand for trial and shall be heard and determined at the earliest practical date, as one having precedence over other

litigation, except suits involving state, county or municipal revenue. The hearing shall be de novo and may be on deposition and interrogatories, or on oral testimony.

(h) The chancellor shall reduce his findings of fact and conclusions of law to writing and make them parts of the record.

(i) Any party dissatisfied with the decree of the court may appeal to the supreme court as provided by the Tennessee Rules of Appellate Procedure, where the cause shall be heard on the transcript of the record from the chancery court. [Acts 1951, ch. 76, § 17 (Williams, § 2345.17); Acts 1981, ch. 449, § 2; T.C.A. (orig. ed.), § 49-1417.]

49-5-514. Merger of local with state tenure system.—(a)(1) Should it be desired to incorporate any local teacher tenure system into the state system, the board having jurisdiction over the teachers under such local system shall publish in some newspaper of general circulation in the town or country in which such local tenure system is located a notice of its intent to apply for admission to the state teacher tenure system and in such notice shall fix the date for a hearing thereon, which date shall not be less than ten (10) days after the first publication of the notice.

(2) Upon the day fixed by such notice for such hearing, which hearing may be adjourned from time to time if deemed necessary, the board shall hear interested parties who shall have the right to appear in person or by counsel upon the advisability of such entry or merger into the state system.

(3) After the local board of education concludes its hearing, the board shall conduct a referendum of the teachers within the local teacher tenure system, and if a majority of the teachers vote in favor of merging with the state system, then the board shall request such merger and shall forward a certified copy of the result of the referendum to the commissioner of education for his consideration.

(4) If he should approve such merger, then he shall give proper notice thereof and at the end of ten (1) days from the giving of such public notice of acceptance, such local tenure system shall be merged

with and become a part of the state teacher tenure system and the members of such local tenure system shall thereupon be entitled to all the benefits of such state tenure system to the same extent as though they had been members thereof from its inception.

(b) As used in this section:

(1) "Board" means any county board of education in a county operating under a local teacher tenure act or any municipal board of education in a city operating under such act; and

(2) "Local teacher tenure systems" means any teacher tenure system applicable only to a county or to a city or town and authorized by special act of the general assembly. [Acts 1953, ch. 263, §§ 1, 2 (Williams, § 2345.19); Acts 1957, ch. 179, § 1; T.C.A. (orig. ed.), § 49-1420.]

49-5-515. Establishment of system for teachers not previously covered.—(a) The state board of education is hereby authorized and directed to establish a system of tenure for teachers in schools and institutions under its jurisdiction.

(b) The board shall promulgate and publish reasonable rules and regulations for the establishment of a tenure system for such teachers and have the power to promulgate and publish such rules and regulations as are deemed reasonably necessary for the establishment of such tenure system, which shall include, but not limited to, standards and requirements concerning:

(1) The minimum qualifications of teachers eligible for tenure;

(2) The types of tenure;

(3) Leaves of absences;

(4) Time of termination of tenure;

(5) Transfer within the system;

(6) Credit for time served in other school systems within the state;

(7) Grounds and procedures concerning suspensions and dismissals;

(8) Investigations;

(9) Suspensions pending investigations; and

(10) Such other subjects as are deemed by the board to be reasonably related to teacher's tenure.

(c) The rules and regulations shall be adopted by a formal resolution by a majority of the membership, and the same shall be signed by a majority of the members of the state board of education as certified by the chairman and attested by the executive secretary of the board, and otherwise they shall be approved and filed in the manner required by the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(d) After giving written notice of charges against any teacher, the board shall hold a hearing in the same manner and shall have the same powers as provided in § 49-5-512; provided, that where such section refers to the superintendent, for the purpose of this part, reference shall be made to the chairman of the state board of education.

(e) A teacher shall be entitled to judicial review of the action of the board for the same purposes and in the same manner provided by § 49-5-513.

(f) For the purpose of this section, "teacher" means any person employed by the state board of education in a full-time position as an administrative officer or teacher in a school or other educational institution except a college or university; provided, that "teacher," as defined in this section, does not apply to the principal or chief administrative officer of such school or institution.

(g) No teacher under the provisions of this section shall be guaranteed continuity of employment in a particular assignment or position. [Acts 1967, ch. 210, §§ 1-3; T.C.A. §§ 49-1423 — 49-1245.]

APPENDIX G

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

For Publication
Filed January 7, 1991

No. 01-S-01-9002-CH-0021
Warren County

MARILYN VAN HOOSER,
Plaintiff-Appellant.

vs.

WARREN COUNTY BOARD OF EDUCATION,
Defendant-Appellee.

For the Appellant:
Charles Hampton White
Richard L. Colbert
Nashville, TN

For the Appellee:
William T. Ramsey
Nashville, TN

REMANDED WITH INSTRUCTIONS

Martha Craig Daughtrey, Justice

OPINION

This case arises out of the alleged misconduct of a teacher, the efforts made to settle the case, and, when those efforts failed, the procedures implemented to seek and obtain her dismissal. It presents substantive issues arising under the Teacher Tenure Act, T.C.A. §§ 39-5-501 et seq., and the Open Meetings Act, T.C.A. §§ 8-44-101 et seq.

The teacher in question, Marilyn Van Hooser, sued for reinstatement and back pay, claiming that she was improperly suspended and then dismissed. After an evidentiary hearing in the trial court, the chancellor ruled in favor of the defendant school board. The plaintiff has now appealed the judgment of the trial court, alleging among other things that the chancellor failed to review the evidence *de novo*. We

conclude that the record supports the judgment, but that there is an ambiguity in the chancellor's memorandum opinion with regard to the standard of review. We therefore remand for the purpose of clarification on this limited procedural issue.

FACTUAL BACKGROUND

When the event underlying this case began, Marilyn Van Hooser was a tenured teacher in the Warren County public school system, assigned to the William Biles Elementary School. She had been having problems getting the third-graders in her class to do their assignments. As she described it, she tried to convey to her students that "you just don't go through life not being responsible, and you do have to learn things . . . and that the third grade is not easy." In an attempt to get them to do their work, Van Hooser had kept her students from going to physical education, and she required them to take their work with them to lunch. She testified that she had not prevented them from going to art and music classes, as she had physical education, because "they didn't care about that and P.E. was important to them." When those efforts failed, Van Hooser decided to use shame and embarrassment to motivate her students to do their work. She testified that she gave them two to three weeks notice that, if they did not start doing their assignments, she was going to have to embarrass them by paddling them in front of the other students. On March 23, 1983, the day of reckoning arrived. Van Hooser, in the presence of a teacher's aide and the rest of the students in the class, paddled at least eight of her students for failing to do their assignments.

On the following morning, Van Hooser was barred by school officials from entering her classroom. She reported to the superintendent's office, as instructed, and Bryan Knight, the superintendent of schools, informed her that she was suspended, pending investigation of the previous day's events.

During the course of the investigation conducted by Bob Mason, director of personnel, the details of the paddling incident were revealed. In addition to reviewing the Department of Human Services photographs of the bruises on the buttocks of the children, he talked to

the parents and five or six of the children who had been paddled. These children told him that they had each received as many as ten or fifteen licks. Van Hooser denied this, and Mason recalled that she admitted to six or seven licks on some of the children. Aleta Robinson, the teacher's aide who witnessed the paddlings, told Mason that the students were given, in general, six or eight licks each and that in her opinion, the paddlings were not excessive. Although no written report was prepared, Mason testified that he turned the notes from his investigation over to Knight within a few days to a week.

Several of the parents of the children who were paddled testified at a public hearing held in May of 1985. They confirmed that their children were bruised and that the children told them they had been paddled for failing to turn in their assignments. Department of Human Services social workers also testified about speaking with some of the students, who told them about being paddled for failing to get their work done.

Mason's investigation revealed that the principal of the school, Jimmy Blankenship, had previously instructed Van Hooser not to paddle students. Blankenship testified that he gave her this instruction during the 1979-80 school year after a paddling she administered was witnessed by two other teachers, Marilyn McGee and Sandra Brownyard. Both of these teachers complained to Blankenship about the excessiveness of the paddling and told him that they did not want to serve as a witness for any more paddlings administered by Van Hooser. At the public school board hearing held on May 28, 1985, Brownyard testified that she was concerned because Van Hooser administered more than the three licks to which they were limited by express instructions in a faculty meeting and by language in the teachers' handbook governing corporal punishment. She testified that she thought that Van Hooser was angry at the time. She also thought that the paddling was too hard because Van Hooser "swung back very far" and "seemed to use a great amount of force," causing the child to lose balance. McGee testified that, when she and Brownyard expressed their concern to Van Hooser, her reply was to the effect that if the child had been doing his homework, he would not have gotten any licks at all. McGee further testified that Van Hooser told her that Blankenship

had spoken with her about the incident and told her not to paddle any more, but rather to refer any discipline problems to him.

Although Van Hooser denied ever having been instructed not to paddle students, Mason testified that when Van Hooser was called to the office on the morning of march 24, 1983, she admitted receiving this instruction. She explained at that time that she thought she was not supposed to spank students for discipline, but that the paddlings on March 23, 1983, were not for "discipline." At trial, Van Hooser stated that at the March 24th meeting, she had tried to explain the difference between what she had done and "spanking."

Van Hooser did admit one instruction from the principal with respect to paddling. It was the practice in Van Hooser's classroom that children would generally receive a paddling on their birthday. After a particularly egregious incident involving a student named Tammie Dodd, during the course of which Van Hooser hit her with a paddle and also allowed the students in the class to paddle her, Van Hooser conceded that Blankenship told her to curtail this practice. Tammie Dodd's mother later testified that her daughter's buttocks were "black and blue" and that she had to be taken to a doctor.

After Van Hooser was suspended, everyone involved began to make efforts to resolve the matter. There had never been any question raised about Van Hooser's ability as a teacher prior to these incidents, and the principal of the school wanted to put her back in the classroom. Because Van Hooser had been told that criminal charges might be brought against her, she hired Thomas Miner as her attorney rather than relying on the attorneys with the Tennessee Education Association. In fact, the matter was submitted to the grand jury, but no indictment was returned. After the criminal matter was thus resolved, Miner began negotiations with counsel for the school board, Michael Galligan.

Miner's first effort in this regard was to delay any proceedings pertaining to Van Hooser that might otherwise have arisen in the regularly scheduled school board meetings. His letter of May 23, 1983, to Galligan states:

> This will confirm our telephone conversation of May 9, 1983 during which I advised you that I represent Marilyn Van Hooser in the above referenced matter and requested that the issue of Marilyn Van Hooser's suspension not be addressed at the May 19, meeting of the Board of Education. I believe that delaying the presentation of this matter until the regular June meeting would be beneficial to all parties involved in that it would give us a sufficient opportunity to discuss the problems and alternative solutions thereto and hopefully arrive at a solution which is satisfactory to all parties concerned.

This was followed by a letter to Galligan dated June 2, 1983, in which Miner stated:

> As you will recall the matter of Marilyn Van Hooser's suspension was taken off the agenda of the last meeting of the school board so that we might have time to discuss it before further action is taken. The June meeting of the school board will be upon us in about two more weeks. We need to use this time to determine if we can't find a practical solution to this matter.

Negotiations continued and Miner eventually transmitted a draft settlement proposal to Galligan. In his letter of July 7, 1983, which accompanied the draft, he stated:

> You will find enclosed a three-page document headed Conditions for Continued Employment. As per our previous discussions this is a draft proposal illustrating steps which might be taken from which both sides can negotiate. My client has indicated that she is willing to accept all the conditions set forth in this agreement in principle, however, she is out of town for the Fourth of July holiday and has not seen the actual document. . .
>
> * * *
>
> I understand because of all the publicity given this matter in the past and the state sunshine laws it will probably be necessary for the board of education to make some form of statement

> regarding the conditions of Marilyn Van Hooser's reemployment. If and when such a statement is to be issued, I hope that the board of education will take into consideration that Marilyn Van Hooser also has certain rights of privacy and that some of the conditions set out in this agreement are sensitive in nature and some could compromise her ability to deal with students, parents and administrators. I strongly encourage the board of education and superintendent to take this into consideration in making any public pronouncements.

Under the terms of the proposed settlement, Van Hooser was to remain suspended through the end of the term and forfeit $4,166 in pay. She was to be reinstated under probation the following term and possibly transferred. She was not to administer corporal punishment for any reason, and she was to undergo psychiatric counselling. Miner later testified that his client knew of these terms and had agreed to them, although she had not seen a final draft of the so-called "Conditions for Continued Employment," which set the terms out in writing.

By August, 1983, the agreement had been worked out but Van Hooser still had not actually signed the Conditions. Galligan had kept the members of the Warren County Board of Education apprised of the situation as negotiations progressed, and he met with them again at a regularly scheduled school board meeting on August 16, 1983. The minutes of the meeting reflect that, in addition to other business conducted at the meeting, "[t]he board retired to discuss the status of . . . Marilyn Van Hooser in private with Attorney Galligan." The minutes fail to reflect that any further discussion was held with respect to Van Hooser. Galligan admitted that, at the time of this closed meeting, there was no lawsuit pending and no charges had been preferred against Van Hooser with the board.

At the closed meeting, Galligan explained the terms of the agreement to the board. He told the board that Van Hooser's attorney had indicated that she had agreed to these terms. Although no vote was taken, all the board members present at this meeting assented to the settlement. However, there is no mention of the Conditions anywhere in the school board's minutes prior to formal charges being preferred against Van Hooser.

In the fall of 1984, Knight contacted Van Hooser and told her that a position was available for her. At that time, no formal charges had yet been preferred against her as a result of the investigation during the previous school year, and the suspension imposed during the investigation had not been officially lifted. As a result, although the matter had never been formally presented to the school board, nor acted upon, Van Hooser was transferred from a position as a classroom teacher to employment filling two part-time librarian slots.

Inexplicably, there is a lengthy delay in getting the document formalizing the settlement of this matter signed by Van Hooser and by a representative of the school board. Van Hooser followed the advice that Miner testified he gave her — she did not take the initiative to comply with the Conditions because no one had taken any action to require her to comply. Finally, in February 1984, Mason, at Knight's request, took a copy of the Conditions to Van Hooser for her signature. She refused to sign it without discussing it with her lawyer. Her testimony was that no one told her there was any time limit on signing the document.

The school board met on March 27, 1984, and adopted Knight's list of teachers to be rehired for the 1984-85 school year. Marilyn Van Hooser's name was not mentioned in the meeting, nor was it included on the list.

On April 12, 184, Van Hooser signed and returned her copy of the Conditions for Continued Employment. She apparently did so only after receiving a letter, dated April 11, from the school board. The letter stated:

> You are hereby notified that the Warren County Board of Education met on March 27, 1984, and failed to rehire you as a teacher in the Warren County School System for the 1984-85 school year. The reason for your not being rehired is because of your neglect to sign the previous agreement entitled, Conditions for Continued Employment, and failure, on your part, to comply with the provisions of same document.

> In our meeting on March 28, 1984, you indicated through your attorney Mr. Thomas Miner, that you would study the probationary employment document and contact us no later than Monday, April 3, 1984, with a decision. You have made no effort to contact us on or prior to this date. Your contract of employment will therefore terminate at the close of the present school year. If you plan to comply with the terms of your agreed upon contract, please advise and make arrangements to do so.

After signing the Conditions, Van Hooser began to make attempts at compliance, but these efforts turned out to be too few and too late.

The first formal, official effort to resolve this matter occurred during a school board meeting held on September 20, 1984. At that meeting, Galligan read a letter that Van Hooser had written to the board, complaining about their failure to rehire her for the 1984-85 school year. A motion was made "not to rehire her due her actions in the [sic] non-compliance with the board's instructions." The motion was passed unanimously. After this meeting Galligan prepared a notice, dated February 14, 1985, in an effort to afford Van Hooser notice of the charges against her in compliance with the applicable statutes.

On October 19, 1984, Van Hooser filed suit seeking both reinstatement as a teacher in the Warren County School System and damages.

Some five months later, on March 28, 1985, the school board again voted on the question of Van Hooser's dismissal, in an attempt to comply fully with the Teacher Tenure Act and the Open Meetings Act. The minutes of that meeting, in pertinent part, state:

> Mr. Mike Galligan, Attorney for the school board, addressed the board concerning the Marilyn Van Hooser case. He told the board that Former Superintendent Bryan Knight suspended Ms. Marilyn Van Hooser because of excessive paddling, violation of the school board policy, and violation of rules set by Jimmie Blankenship, principal at William Biles school. Mr. Galligan told the board that in the Spring of 1983, he prepared charges

against Ms. Van Hooser for former Superintendent Knight to present to the board. He stated that Knight did not bring the charges to the board at the request of Mr. Tom Miner, Attorney for Ms. Van hooser, because of adverse publicity that might result in damaging her career and reputation. Mr. Miner requested that an investigation be conducted. Mr. Bob C. Mason, personnel Director, conducted an investigation for Warren County Schools. The Department of Human Services conducted an investigation which included photographs of the allegedly abused children. (Mr. Larry Ross from the Office of the District Attorney also conducted an investigation.) After these investigations, a "Conditions of Employment" was drawn up by Mr. Miner, Mr. Galligan, Mr. Knight, and Mr. Mason. (Copy to become part of the minutes.) He further stated to the board that on April 12, 1984, she signed the agreement after her name was left off the list of teachers rehired in March 1984. He told the board the reason she was left off the list was because she had not complied with the agreement at the proper time. In September, 1984, Ms. Van Hooser was again not rehired.

Mr. Galligan told the board that this case has not followed correct legal procedures to dismiss a teacher. He asked the board if they wanted to proceed with the charges. Mr. Galligan said in the future, the board should follow correct legal procedures instead of trying to keep publicity down at someone's request. He told the board that by trying to help this individual it caused the board to follow incorrect dismissal procedures in this case. Galligan stated that the charges could still be valid if properly handled.

After further discussion, Mr. Galligan read the charges brought against Ms. Van Hooser by Mr. Bob C. Mason. (Copy to become part of these minutes.) After hearing the charges, the board determined that the charges were severe enough that they would warrant having a hearing on them and taking appropriate action. Motion by Mansfield, seconded by Clark that the charges are such that if true, board action would be appropriate to dismiss, suspend, or probate Ms. Van Hooser. Therefore, the charges should be sent to Ms. Van Hooser and she should be notified she

has a right to a hearing (Copy of the letter to Ms. Van Hooser from the board shall become a part of these minutes.) Motion passed unanimously.

The board sent notice of the charges to Van Hooser in a letter dated March 29, 1985, which stated:

> Charges have been made charging you with offenses which would justify your dismissal/suspension or probation/. These charges were made in writing by the Director of Personnel of the Warren County School system, and they are as follows:
>
> 1. You paddled students after you had been told not to do so by the Principal of William Biles School, Mr. Jimmy Blankenship.
>
> 2. You violated the orders of said principal not to paddle students more than three licks.
>
> 3. You have violated the school board policies in not having proper witnesses present during the paddling of students.
>
> 4. You allowed other students to paddle another student on one occasion.
>
> 5. You paddled students for improper purposes.
>
> 6. You used excessive force in paddling students.
>
> In addition to the above, you agreed, through your attorney, Thomas J. Miner, to certain conditions of re-employment which you were to have signed during the summer of 1983. However, you did not sign the document outlining these conditions until April 12, 1984. It is alleged that you did not comply with that agreement and, therefore, violated your agreements with the Warren County Board of Education, which would be insubordination as defined in Tennessee Code Annotated, § 49-5-501.
>
> The school board finds that these are charges which would justify dismissal/suspension or probation/of a teacher if they are found to be true and, therefore, pursuant to Tennessee Code Annotated

> § 49-5-511, we are notifying you that you have a right to a hearing on these charges and that you have thirty days in which to request such a hearing pursuant to Tennessee Code Annotated § 49-5-512.
>
> Enclosed is a form promulgated by the Commissioner of Education of the State of Tennessee which may further explain your rights to you.

Van Hooser did avail herself of the right to a public hearing. It was held on May 28, 1985. At the hearing, witnesses testified against her and on her behalf. Her attorneys tried to explain the requirements of the Open Meetings Act and the Teacher Tenure Act and argued that the actions of the superintendent and the school board had violated both of these statutes. In the end, the board voted to dismiss Van Hooser.

Van Hooser amended her complaint, filed previously on Oct. 19, 1984, to seek the judicial review afforded by T.C.A. § 49-5-513. A trial was held at the close of which the chancellor determined that the school board was justified in dismissing Van Hooser. The chancellor held that there was no violation of the Teacher Tenure Act because a hearing was eventually held. The chancellor also stated that the Open Meetings Act was inapplicable because of Van Hooser's request through her attorney that the matter be handled circumspectly, and because of the nature of the resulting closed school board meeting with Galligan on August 16, 1984.

Van Hooser's appeal from the decision of the trial court presents three issues. She asserts that the chancellor's review of the school board's actions was conducted under an improper standard of review. She also asserts that the manner in which her case was brought before the school board violated both the Open Meetings Acts, T.C.A. §§ 8-44-101 et seq., and the Teacher Tenure Act, T.C.A. §§ 49-5-501 et seq. Based on these alleged errors, Van Hooser seeks reinstatement as a classroom teacher, as well as damages for lost income in the 1982-83 and 1984-85 school years. The defendant school board has apparently conceded that it is liable to the plaintiff for wages she lost during the latter school year, because of the school board's failure to comply fully

with the provisions of the tenure statute. That issue is no longer before us.

STANDARD OF REVIEW

We have most recently discussed the standard of review to be applied to school board determinations in *Cooper v. Williamson County Board of Education*, 746 S.W.2d 176 (Tenn. 1987). Distinguishing between the standards applicable to review by common law writ of certiorari and by statutory writ of certiorari, we held that the review afforded by T.C.A. § 49-5-513 is not limited to a determination of whether the board acted within its jurisdiction, or acted arbitrarily, capriciously, or illegally. *Id.* at 179. Rather, it is a trial *de novo*, T.C.A. 49-5-513(g), in which the chancellor must reduce his findings of fact and conclusions of law to writing and include them in the record. § 49-5-513(h). This appeal is akin to an appeal from a decision of a general sessions court in that the chancellor is required to reconsider and redetermine all the issues of fact, as well as law as if no such determination had been previously made. *Cooper*, at 181. Hence, the chancellor must substitute his judgment for that of the board. *Id.* at 182. The scope of review is not confined to whether the evidence considered by the school board preponderates in its favor, and no presumption attaches to the school board's determinations. *Id.* at 181.

Unfortunately, in this case we are unable to say with certainty that the correct standard of review was applied. In his memorandum opinion, the chancellor summarized the events that precipitated Van Hooser's dismissal. It appears that this summary may have been based upon evidence presented at trial, but there is no designation as such. In closing, moreover, the chancellor noted that a public hearing had been held, that the plaintiff had not testified, and that "[i]f there had been other evidence presented perhaps their [board members'] minds might have been changed." The opinion then concludes, "The Court cannot speculate on this [possibility]. It can only conclude that the evidence presented [at the public hearing? or at the later trial?] was sufficient to sustain the termination. For these reasons the Court finds that the Warren County School Board was justified in dismissing the plaintiff."

At the very least, this language in the chancellor's opinion creates an ambiguity concerning the standard or review applied to the facts in this case. We therefore find it necessary to remand the matter for the purpose of clarification. If the chancellor based his ruling on the evidence presented to him at trial, *de novo*, he need only say so in a one-sentence amendment to his memorandum opinion. If, on the other hand, his ruling was based on a determination that evidence before the board justified the board's conclusion and that the proof at trial did not preponderate otherwise, then it will be necessary for him to reweigh the evidence presented in court in conformity with the procedure outlined in *Cooper* and recertify his findings of fact and conclusions of law to this Court.

OPEN MEETINGS ACT

Van Hooser next asserts that the board engaged in repeated violations of the Open Meetings Act, but she specifically seeks relief based on her contention that the school board violated the Open Meetings Act when they met in closed session with their attorney Michael Galligan on August 16, 1983, to discuss her situation.

The defendants assert in response that there was no violation of the Open Meetings Act. They contend that the attorney-client exception recognized in *Smith County Education Association v. Anderson*, 676 S.W.2d 328 (Tenn. 1984), applies in this situation because, although there had been no charges preferred against Van Hooser as of August 16, 1983, there was a pending controversy that was likely to result in litigation between the school district and Van Hooser. Further, they assert that Van Hooser is estopped to assert any violation of this Act because of her requests through her attorney that her privacy interests be respected.

We agree with the defendants' assertion that the board had a right to meet with its attorney to discuss the pending controversy pertaining to Marilyn Van Hooser. However, to the extent that the board made decisions or deliberated toward a decision, this was a "meeting" to which the Open Meetings Act applies. T.C.A. § 8-44-102(c). Given testimony that the Conditions were discussed in the meeting and the

fact that these Conditions are not mentioned anywhere else in the minutes, we must assume that the board acted to approve the Conditions in this private meeting. Because this action was taken in violation of the Open Meetings Act, the board's attempted settlement of this controversy by approval of the Conditions for Continued Employment is void and of effect. T.C A. § 8-44-105.

However, our holding that the action taken by the board in this regard is of no effect does not mean that Van Hooser is entitled to the relief that she seeks. The defendants concede that Van Hooser is entitled to back pay for the 1984-85 school year. The real question on appeal concerns whether Van Hooser should be reinstated. The board's violation of the Open Meetings Act does not entitle her to reinstatement. She may be reinstated only if, after remand, the chancellor finds that the evidence presented against her at the public hearing in May 1985 fails to establish any of the causes for dismissal set forth in T.C.A. § 49-5-511(a)(2).

Given our decision with respect to the attorney-client exception, we pretermit consideration of the defendants' additional assertions on this issue. We would, however, note that the actions of Van Hooser and her attorney contributed to the ultimate violation of the Act. We would he hesitant to grant her relief because of this fact alone because, generally, injunctions will not issue to relieve a party from a situation brought about by that party's own act or omission. *Winters v. Allen*, 62 S.W.2d 51, 52, 166 Tenn. 281, 284 (Tenn. 1933).

TEACHER TENURE ACT

Van Hooser finally asserts that the manner in which her suspension from teaching was handled violated the Teacher Tenure Act, and she therefore seeks to be awarded back pay for the period of her suspension at the end of the 1982-83 school year. Van Hooser was suspended on March 24, 1983, pending the investigation of the events of the day before. Testimony at trial indicates that this investigation was completed no later than the beginning of April 1983, but there is no mention of Marilyn Van Hooser's name in any of the board's minutes for the rest of the school year. In fact, Van Hooser was re-employed and

transferred to another position for the 1983-84 school year without any mention of the suspension or approval of the transfer in the school board's minutes. Van Hooser asserts that she is entitled to back pay for the period of her suspension because of the delay in taking action after the termination of the investigation.

T.C.A. § 49-5-511, in pertinent part provides:

> Dismissal or suspension of teachers in general. - (a)(1) No teacher shall be dismissed or suspended except as provided in this part.
>
> (2) The causes for which a teacher may be dismissed are as follows: Incompetence, inefficiency, neglect of duty, unprofessional conduct, and insubordination, as defined in § 49-5-501.
>
> (3) A superintendent may suspend a teacher at any time that may seem necessary, pending investigation or final disposition of a case before the board or an appeal, provided that if the teacher is vindicated or reinstated, he shall be paid the full salary for the period during which he was suspended.

Although "reinstatement" and "vindication" are not defined in the statute, we hold that the events in this case can not possibly be construed as constituting either of these events.

All of the proceedings to this point have terminated in decisions against Van Hooser. Obviously, she has not been "vindicated" of the charges underlying her suspension. However, if on remand, the chancellor determines that her dismissal was improper, then back pay for the period of her suspension would be appropriate.

Likewise, at this point, Van Hooser can not be said to have been "reinstated." Reinstatement implies restoration to a position from which a person has been removed. Van Hooser was not restored to a position teaching third-graders. In fact, she was moved to a position where she had less student contact and less opportunity to engage in the type of conduct for which she was suspended. Although she was temporarily reemployed in the Warren County School System, then-superintendent Knight testified that this action was taken because

negotiations were continuing with her attorney to settle the matter. He could have continued the suspension until the final disposition of the matter on appeal. T.C.A. § 49-5-511(a)(3). Hence, we cannot construe Van Hooser's reemployment to be "reinstatement" such as to allow her to recover back pay for the period of her suspension, when that suspension resulted from charges for which she was ultimately dismissed.

Van Hooser also seeks to be reinstated to her former position as a classroom teacher because of various acts of the school board, which she asserts violate the Teacher Tenure Act, T.C.A. §§ 49-5-501 et seq. She insists that the later acts of the board preceding and including the May 1985 hearing cannot cure the board's earlier violations of the Act.

The procedures to be followed in considering the potential dismissal of a teacher are set forth at T.C.A. § 49-5-511(a), which, in pertinent part, provides:

> (4) When charges are made to the board of education against a teacher, charging the teacher with offenses which would justify dismissal of the teacher under the terms of this part, the charges shall be made in writing, specifically stating the offenses which are charged, and shall be signed by the party or parties making the charges.
>
> (5) If in the opinion of the board, charges are of such nature as to warrant the dismissal of the teacher, the superintendent shall give the teacher a written notice of this decision, together with a copy of the charges against him, and a copy of a form which shall be provided by the state commissioner of education advising the teacher as to his legal duties, rights, and recourse under the terms of this part.

After receiving notice of charges under the above statute, a teacher may seek a hearing before the school board pursuant to T.C.A. § 49-5-512. The teacher must notify the superintendent within 30 days of receipt of the notice of the teacher's intention to seek this hearing. The teacher may be represented by an attorney and may present witnesses, evidence, and argument to support his or her contentions. The school

board must make a decision within 10 days and immediately give the teacher notice.

We hold that Van Hooser was afforded the appropriate procedures as set forth in the Teacher Tenure Act. The school board's minutes of the March 28 meeting reflect that Galligan addressed the board, explained the case to them, and read the charges against Van Hooser. The board voted to give Van Hooser notice of the charges against her because they were serious enough to warrant dismissal, suspension or probation. Written notice, dated March 29, 1985, was provided to Van Hooser. On May 28-30, 1985, Van Hooser was afforded the hearing provided by statute, and, by letter dated June 7, 1985, the board informed her that she was dismissed, based on the board's determination that she had committed the acts with which she was charged.

We are not unsympathetic to Van Hooser's concerns that the school board had predetermined her case before any formal charges were ever filed against her. These are valid concerns in a school system where, in the course of their daily duties, school board members are privy to information about cases that may ultimately reach them in an official proceeding to seek the dismissal of a teacher. These concerns, however, do not justify Van Hooser's reinstatement. To hold otherwise would mean that the school board could never initiate dismissal proceedings against her, regardless of how meritorious the charges might be, because of prior ill-conceived actions.

We addressed this same concern in *Cooper*. There we quoted *Potts v. Gibson*, 225 Tenn. 321, 323, 469 S.W.2d 130, 135 (1971), in which the Court noted:

> "It is inevitable that members of a school board should form an opinion, good or bad, of teachers and especially school principals within the system. And by reason of their official duties the members may possess valuable information either for or against individual members of the teaching and executive staff and consequently can offer valuable testimony at a disciplinary hearing before the board. Yet, the law makes no provision for a hearing before another tribunal. Much of the mischief which

> could result from the system is obviated by the right to a trial *de novo* conferred by [this statute]."

As we held in *Cooper*, any danger of arbitrariness, capriciousness, or bias is cured when, in the hearing *de novo*, the trial court readjudicates the matter in neutral forum.

Accordingly, we remand this case to the trial court for further clarification and, if necessary, review of the record as previously described. Costs of appeal are assessed equally.

/s/ Martha Craig Daughtrey

Martha Craig Daughtrey, Justice

Concur:

Drowota, C.J.
Fones, Cooper, O'Brien, JJ.

Supreme Court, U.S.
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(2)

No. 90-1291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FREEMAN M. COOPER,
Petitioner,

VS.

WILLAMSON COUNTY BOARD OF EDUCATION,
Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of Tennessee

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Do the pre-termination hearings afforded the Petitioner before the School Board and Chancery Court meet the requirements of the Due Process Clause of the United States Constitution?

2. Were the pre-termination proceedings in this case so unfair as to overcome the facts justifying the Petitioner's dismissal?

PARTIES TO PROCEEDINGS BELOW

The statement submitted by the Petitioner on page ii regarding the parties to the proceedings below is correctly stated with no additions or corrections stated thereto by the Respondent.

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No. 90-1291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FREEMAN M. COOPER,
Petitioner,

VS.

WILLIAMSON COUNTY BOARD OF EDUCATION,
Respondents.

Petition for a Writ of Certiorari to the
Supreme Court of Tennessee

RESPONDENT'S BRIEF IN OPPOSTION

SUMMARY OF REASONS FOR DENYING THE WRIT

The Petitioner was afforded more than the basic process due him prior to his dismissal as a tenured teacher from the Williamson County School System.

Examined factually, the Circuit Court cases cited by the Petitioner do not show a split in the due process requirements of pre-termination procedures as set forth in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Inadequate proof exists in this record to show that the entire twelve member School Board was so biased and prejudiced as to nullify the entire proceedings on Constitutional grounds.

The Tennessee Supreme Court remanded the case to Chancery Court to allow the Petitioner *further* opportunities to present his case while on suspension. After examining the facts on a second appeal, the Court was justified in finding that the Petitioner's dismissal was supported by a preponderance of the evidence and that all procedural and substantive due process requirements had been met.

OPINIONS BELOW

This case has been before the Tennessee Supreme Court twice. *Cooper v. The Williamson County Board of Education*, 746 S.W.2d 176 (Tenn. 1987), is correctly reprinted at Appendix C of the Petitioner's Writ, pages A-19 through A-32. It is hereinafter referred to as *Cooper I*.

The second appeal to the Tennessee Supreme Court, *Cooper v. Williamson County Board of Education*, 803 S.W.2d 200, was decided on September 17, 1990. Petitioner's request for a re-hearing was denied on November 13, 1990. The second Tennessee Supreme Court decision is correctly reprinted at Appendix A of Petitioner's Writ, pages A-1 through A-12. It is hereinafter referred to as *Cooper II*. The denial of a rehearing is correctly reprinted on page A-39 in Petitioner's Appendix.

STATEMENT OF THE CASE
PROCEDURAL HISTORY

After the Petitioner (Cooper) was dismissed by the Williamson County Board of Education (Board), he appealed his dismissal to the Chancery Court of Williamson County, Tennessee. That matter was tried before Chancellor Bell on November 5, 1986. A memorandum opinion issued from that trial on January 5, 1987, sustaining the Board's action in dismissing Cooper. (See Appendix B to Petitioner's Writ). The case was appealed directly to the Tennessee Supreme Court pursuant to T.C.A. 49-5-513(i). That Court found in favor of the Board on the issue

of the Tennessee Open Meetings Act violations, T.C.A. 8-44-101, *et. seq.*, and on the issue that Cooper was denied due process of law. (See Appendix C to Petitioner's Writ). The Tennessee Supreme Court remanded the matter back to Chancellor Bell for a new hearing on the merits after it opined that the Chancellor's method in hearing the case deprived Cooper of his right to a hearing *de novo* under the statutory scheme set forth in T.C.A. 49-5-513. *Cooper I.*

The case was tried a second time on December 13 and 14, 1988. On January 24, 1989, Chancellor Bell issued a second memorandum opinion again sustaining the action of the Board in dismissing Cooper from the System. (See Appendix D to Petitioner's Writ). The matter was appealed again to the Tennessee Supreme Court pursuant to T.C.A. 49-5-513(i). That Court decided the case in favor of the Respondent finding that Petitioner had been afforded the necessary *de novo* review, due process had been met, and the Board proved its case by the required preponderance. A Petition for re-hearing was subsequently denied. *Cooper II.* (See Appendix A to Petitioner's Writ and page 39 of the Writ).

FACTUAL HISTORY

The Board does not dispute the facts stated in Cooper's Petition regarding his length of service as a teacher with the Board nor does it contest his tenure status and the fact that he became a principal for the Board pursuant to the order of U. S. District Judge Thomas Wiseman in a Title VII action filed by Cooper. *Cooper v. Williamson County Board of Education. et al*, No. 3-80-3393. However, considerable additions and/or corrections are supplied here to supplement and clarify the Statement of Facts filed by Cooper.

Cooper began his Fairview High principalship in the fall of 1984. His refusal to cooperate began early on in his principalship there.

On September 4, 1984, Cooper requested Fleming's attendance at Fairview High School but refused to tell Fleming, upon inquiry, why he wanted him there the following day. (D.C. Tr. p. 730, 11. 10-23). It was not until Fleming arrived at school the next day that he learned that Cooper wanted him to speak to the faculty and staff. Fleming then asked Cooper what was to be the subject on which he was to address the faculty. (D.C. Tr. p. 731, 11. 2-22). Only at Flemings's insistence did Cooper state that he had received several reports that members of the faculty were encouraging student walkouts. (D.C. Tr. p. 732, 11. 1-6). Fleming asked for the names of the specific teachers so those teachers could be addressed rather than the entire faculty. Cooper refused to give Fleming any of the teachers' names. (D.C. Tr. p. 732, 11. 6-22). Fleming, despite lack of notice, spoke to the faculty and staff. Cooper then praised Fleming in front of the faculty for the manner in which he handled the situation. Cooper later filed an EEOC complaint against Fleming complaining of the manner in which Fleming handled the meeting. (D.C. Tr. p. 734, 1. 5 to p. 735, 1. 22; pp. 23-25; p. 736, 11. 3-5; p. 527, 11. 5-8).

Upon learning on November 7, 1984, that the students had exited the school, Fleming immediately went to Fairview High School to check on the situation. (D.C. Tr. p. 530 1. 25). Finding the students back in the building and generally orderly, Fleming sent for Cooper, who was attending an optional Principal's meeting, asking that he return to the school so that he could assist in dealing with student concerns. (D.C. Tr. p. 532 11. 4-21). During and after this incident, Fleming reminded the students at Fairview High that Cooper was the principal of the school and they must so recognize him. (D.C. Tr. p. 531, 11. 12-16).

On that evening of November 7, 1984, Cooper granted an interview with Ralph Dawson of **THE NASHVILLE TENNESSEAN** and in it Cooper publicly blamed the student walkout on the faculty, a fact he later denied and then subsequently affirmed. (D.C. Tr. pp. 746, 1. 6-p. 757, 1. 10).

In the midst of the turmoil that occurred at Fairview on November 7, 1984, and the two days following, Cooper announced to Fleming that he had previously requested leave for the following two days and that he would not be at school. (D.C. Tr. p. 741, 11, 15-25). Fleming reminded Cooper of the seriousness of the situation at the school and that none of it had been contemplated when the leave request had been submitted. He stressed to Cooper the need to be present the next day. (D.C. Tr. p. 742, 11. 1-13). Cooper insisted that he had to be away. Finally, in response to a telephone call to Cooper's home that night, Cooper reluctantly agreed to be at the school the next morning. (D.C. Tr. p. 747, 1. 19-p. 748, 1. 13).

Against this factual backdrop, charges were initially brought against Cooper before the Board in January of 1985. They were the subject of a multi-night hearing that ended on April 1, 1985. The charges were dismissed by the Board and Cooper remained as the principal of Fairview High School. All parties were admonished by the Board's Chairman to work together for the success of Fairview High. (D.C. Tr. pp. 372-378).

MANAGEMENT ACTION PLAN

A management action plan (M.A.P.) was requested by Board Member Neil at the conclusion of the first hearing. He stated that its purpose was to assist Cooper. (D.C. Tr. p. 351,1. 12-p. 352, 1.4). Cooper had never been a high school principal. (D.C. Tr. p. 254, 11. 9-19).

When the M.A.P. was finally approved on August 7, 1985, Fleming instructed Cooper to distribute it to the Fairview High faculty. (R. Exhibit 1., p. 50, 11. 11-16). After several written directives were sent from Fleming to Cooper to distribute the M.A.P. to the faculty, Cooper told Fleming on October 25, 1985, that he would distribute the M.A.P. to the faculty within 10 minutes to 30 days after he returned to work from sick leave. (R. Exhibit 1, p. 52, 1. 21-p. 53, 1. 11). Cooper finally distributed the

M.A.P. to his faculty on November 19, 1985, after having received eleven different instructions to do so. (R. Exhibit 1, p. 53, 11. 16-21; p. 54, 11. 3-5).

Cooper was required to provide to the Superintendent a report of his progress on the M.A.P. so that Fleming could incorporate that into his report to the Board for the October 14, 1985, meeting. (R. Exhibit 1, p. 42, 11. 18-24). Fleming never received a report from Cooper for that meeting, nor for the Board meeting of October 21, 1985, or November 6, 1985. (R. Exhibit 1, p. 43, 1. 21-p. 44, 1. 5). Fleming did not see Cooper's report, much of which pertained to routine matters and sketches of cheerleader jumps rather than material required by the M.A.P., until Cooper submitted it to the Board on November 25, 1985. (R. Exhibit 1, p. 44, 1. 19-p. 45, 1. 2; see additional Exhibit B.1 submitted by Cooper in his Offer of Proof). Prior to the submission of this report to the Board, and during the time Fleming requested Cooper's input, Cooper, while on sick leave, delivered to **THE NASHVILLE TENNESSEAN** a lengthy press release which constituted his response to Fleming's bi-monthly report. (R. Exhibit 1, p. 45, line 1-9; p. 47, line 21).

SICK LEAVE

From the time of April 1, 1985, until November 25, 1985, Cooper missed 67 work days. He does not dispute those figures. (R. Exhibit 1. p. 17, 11. 3-5, p. 361, 11. 20-p. 352, 1. 1).

Questions about the status of his health and requests for specific information about his health were made in writing on April 22, 1985, November 7, 11 and 13, 1985, (R. Exhibit 1, p. 18, 11. 2-25), and verbally on April 10, 16, and 29, and November 6, 1985. (R. Exhibit 1,pp. 19-20; pp. 31, 1. 19-p. 33, 1. 10). Cooper was admitted to the hospital in the spring of 1985, under an assumed name and the first time the Board heard from Cooper's doctor in person, or heard any specific reasons from his doctor for his absences, was in preparation for the Contempt of

Court hearing (filed by Cooper) in Federal Court in May of 1986. (12-13-88 Tr. p. 184).

In the midst of his sick leave in October, 1985, Cooper took two personal leave days and went to Columbia, Tennessee. (R. Exhibit 1, p. 21 11. 3-17; p. 464, 11. 6-24). Earlier, Cooper had notified Fleming that he--Cooper--would be out until further notice or after his re-examination on June 7, 1985. Two days before the June 7th re-examination deadline, Cooper attended a career-ladder seminar at Brentwood High School in order to qualify for a $1,000.00 salary supplement. (R. Exhibit 1, p. 29, 1. 5-p. 30, 1. 5). Finally, while Cooper did not attend graduation at Fairview High on June 4, 1985, claiming ill health, he did attend the aforementioned career-ladder seminar the next day. (R. Exhibit 1, p. 377, 1. 7-p. 378, 1. 10).

The Board first learned that Cooper had been seen by Dr. Jordan, a psychiatrist, in 1985, when his physician (Dr. Alexander's) deposition was taken in April of 1986. (12-13-88 Tr. p. 248). Dr. Jordan did no psychological testing. (12-13-88 Tr. p. 248). He did, however,find that in the spring of 1985 Cooper was stable, emotionally secure, a gentlemen who was functioning quite well from a psychological standpoint. (12-13-88 Tr. p. 231).

Dr. Jordan further noted and submitted in a written report the following:

> "However, he indicates he has an interest in removing himself from the school system as soon as possible. As you know, he's an ordained minister in the African Methodist Episcopal Church and has pastored in the past. He says that he is going to contact his bishop and make known his availability, such that, when he can be given an appointment which he feels is comfortable to his needs, he will resign from the school system and go into an active full-time ministry. He has indicated an interest in doing this as of the summer of 1986.

(12-13-88) Tr. p. 246). Dr. Jordan felt that this was a good plan for Cooper. (12-13-88 Tr. p. 238). Cooper's previously expressed desire to leave the school system (as he had stated earlier to Dr. Jordan) spawned settlement discussions in August, 1985, that were initiated by his attorneys. (12-13-88 Tr. p. 342).

RESPONSE TO ORAL AND WRITTEN DIRECTIVES

On October 11, 1985, Fleming contacted Cooper about meeting for a Board/State required principal evaluation conference. (R. Exhibit 1, p. 73, 11. 16-21). Cooper told Fleming he would not meet with him. (R. Exhibit 1, p. 177, 1. 9-p. 178, 1. 5). Fleming contacted Cooper on October 18, 22, 25, 1985, and November 11, 1985, trying to schedule the evaluation conference. (R. Exhibit 1, p. 73, 1. 21-p. 75, 1. 4). The conference was finally held on November 19, 1985. (R. Exhibit 1, p. 75, 11. 1-4).

At the conclusion of a meeting on October 9, 1985, between Cooper, Fleming, Jan Daugherty, a teacher at Fairview High and her representative, Walt Olsen, Fleming directed Cooper to remove from her personnel file a written reprimand that Cooper had issued to Daugherty. (R. Exhibit 1, p. 60, 1. 21-p. 61, 1. 3). Fleming issued a written notice on October 10, 1985, to Cooper following up on the previous oral directive. (R. Exhibit 1, p. 61, 11. 10-14). Fleming established a deadline of October 16, 1985, for Cooper to respond to the oral and written directives. (R. Exhibit 1, p. 6, 1. 23-p. 62, 1. 1). On October 25, 1985, and November 6, 1985, Cooper told Fleming that he had not decided whether he would comply with Fleming's directives to remove the reprimand. (R. Exhibit 1, p. 62, 11. 9-13; p. 62, 11. 16-20). On November 18, 1985, Cooper told Fleming that he had pulled the reprimand from Daugherty's file. During the dismissal hearing, Cooper stated that he had actually removed the reprimand from Daugherty's file immediately upon return from the October 9th meeting. (R. Exhibit 1, p. 62, 1, 21-p. 63, 1. 21).

During the a meeting between Fleming and Cooper on April 8, 1985, a discussion occurred between the two concerning the filling of a vacancy for a math position at Fairview High. The two discussed this subject before, and Fleming had already told Cooper that he had, upon recommendation of the secondary supervisor, Arthur Vosburgh, rejected Cooper's recommendation of one Roosevelt Harvey. When Fleming asked Cooper if he was going to recommend someone other than Harvey for the position (which is required of principals when recommendations are rejected) Cooper refused to state whether he would recommend someone other than Harvey by the April 23, 1985, deadline established by Fleming. Who Cooper was to recommend other than Harvey was up to Cooper. (R. Exhibit 1, p. 69, 11. 11-16). Cooper did not make his recommendation to Fleming until May 13, 1985. On that date he recommended Roosevelt Harvey. (For entire discussion of this issue, see R. Exhibit 1, p. 66, 1. 12-p. 73, 1. 11; D.C. Tr. p. 672, 1. 15-p. 680, 1. 13; D.C. Tr. Exhibit 11).

Cooper admitted in the second trial that he was not confused about Fleming's directives on the Daugherty and Harvey issues. (12-13-88 Tr. p. 456).

Cooper received a request from Robert Cullen to supply to Cullen by October 16, 1985, a plan for having all teachers assigned to their areas of certification by the 1986-87 school years. (R. Exhibit 1, p. 277, 1.22-p. 278, 1.2). Another reminder was sent to Cooper on December 11, 1985, Cullen received the report on December 17, 1985. (R. Exhibit 1, p. 278, 11.2-11).

Fleming could never finish a task or assignment in trying to work with Cooper without the attempt becoming a major production. (R. Exhibit 1, p. 188, 1. 18-p. 189, 1. 1; p. 191, 1. 21-p. 192, 1. 7). It was equally difficult to get Cooper to respond in a straightforward manner. (R. Exhibit 1, p. 413, 1. 25-p. 414, 1. 24). Fleming did not experience similar difficulty with other principals in obtaining satisfactory responses to his requests. (R. Exhibit 1, p. 167, 11. 3-10).

ARGUMENT

I

THE DECISION OF THE SUPREME COURT OF TENNESSEE IS NOT IN CONFLICT WITH THE *LOUDERMILL* DECISION

Petitioner relies heavily upon *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, (1985), as grounds for submitting that Petitioner's due process rights have been violated. A *Loudermill* argument in this case is misplaced. Factually, the differences between *Loudermill* and the instant case are glaringly obvious. *Loudermill* was dismissed from public employment because he had lied on his employment application. He was then given notice of a hearing *post*-termination. An Ohio statute created a property right in public employment for Loudermill, and this Court found that that property right could not be taken without an opportunity to respond to charges against that employee *before* his dismissal.

In this case, written charges were presented to Mr. Cooper prior to his dismissal on those charges. A lengthy hearing occurred wherein proof supporting those charges was first presented with extensive cross-examination of witnesses testifying in support of the charges. Mr. Cooper had the opportunity to present his side of the story. *Then* the Board voted on the charges. This notice and hearing was all *pre*-termination. Therefore, on its face, there is no factual similarity between the lack of due process protection in *Loudermill*, and the due process provided to Cooper before his dismissal.

The Tennessee Courts are not without sensitivity to due process claims and fundamental fairness when it comes to dismissing public school teachers. The case of *Turk v. The Franklin Special School District* at 640 S.W. 2d 218 (Tenn. 1982), is illustrative of Tennessee's concern for these issues. In

that case, Ms. Turk was charged with DUI while off duty and the Superintendent of the School System subsequently read about it in the newspaper. He then called Ms. Turk to his office and gave her two choices: (1) relinquish tenure and accept probationary status and counseling for what the Superintendent had concluded was an alcohol problem; (2) resign her position as a tenured teacher. Ms. Turk declined both offers and the Superintendent then filed charges against her.

When Ms. Turk was brought in for the Board hearing, matters were brought up which did not appear in the written charges that had been submitted to her. The same Chancellor that decided *Cooper I* and *Cooper II* ruled that Ms. Turk was not given a fair hearing because matters were brought up for which she was given no notice. He then made an independent finding that if the extraneous matters had been in the written charges, they would not have adversely affected her ability to teach in the public school system in Franklin, Tennessee. The Tennessee Supreme Court opined, upon appeal, that --

> "We are of the opinion that it was fundamental error for the Board to consider the June, 1979, accident, or her absentee record, or the Superintendent's charge that she had an alcohol problem that required her acknowledgment of same and treatment therefor, because those charges were not specified in writing prior to the hearing." At p. 220.

Under any definition, the aforementioned proceedings did indeed fail to provide the adequate due process to Ms. Turk.

It is significant to note that the statutory scheme in Tennessee under the Tenure Act further states that after a school board has made a decision and the teacher appeals the case to Chancery Court,

> "the filing of such Petition *shall suspend the Order of the Board* pending a decision by the Chancellor, but the teacher

> shall not be permitted to return to teaching pending final disposition of the appeal." T.C.A. 49-5-513(e) (Emphasis supplied).

Thus, it can be argued that the hearing before the Chancellor is *pre*-termination. The due process afforded to Freeman Cooper, and any other teacher in Tennessee under its Teacher Tenure Act, is more than adequate to meet the guarantees of the United States Constitution, *Loudermill*, and its progeny.

Petitioner further contends that under the tenure scheme stated in T.C.A. 49-5-513, and the *de novo* judicial review provisions contained therein the slate is not wiped clean when the matter is heard by the Chancellor. His "cold tater" argument ignores the plain language of the statute, strips the Chancellor of any vestige of a presumption of honesty and good faith, and attempts to stretch the requirements of due process beyond constitutional mandates. Whereas Ohio statutes did not clearly outline in *Loudermill* the process that is due once a property right is established, Tennessee's Teacher Tenure Act establishes due process in terms and amounts that far exceed the minimum requirements.

II

THE PETITIONER HAS NOT ESTBLISHED THAT THE BOARD ACTED IN A MANNER SO AS TO RENDER IT BIASED OR PREJUDICED IN CARRYING OUT ITS STATUTORY DUTIES IN RELATION TO THE DISCHARGE OF COOPER

The Petitioner refers this Court to the cases of *Staton v. Mayes*, 552 F.2d 908 (10th Cir. 1977), *cert. denied*, 434 U.S. 907 (1977), and *Miller v. City of Mission, Kansas*, 705 F.2d 368 (10th Cir. 1983), in an effort to demonstrate that the Board in this case was biased and prejudiced and therefore did not provide Cooper with a fair hearing. These cases are helpful in defining what constitutes bias or prejudice in connection with termination hearings,

for in each case, the Court rendered its decision based upon specific facts which gave rise to an unfair hearing.

In *Staton*, supra, the Tenth Circuit held that a Board decision to terminate a school superintendent was unfair where Board members expressed their desire to fire the superintendent prior to the dismissal hearing. The Petitioner summarizes the crucial facts stating that "prior to the Board hearing, several of the Board members had voiced their views that a new superintendent was needed." (Petition at p. 19) In reality, the facts demonstrated that before the decision to dismiss Staton, two members of the five member Board had voted not to renew the superintendent's contract and one member had made public statements in the media during his campaign for election to the Board, that it was his opinion and the opinion of the two other members "that no progress could be made with school problems until there was a new superintendent." At p. 913.

The initial written communication from the Board to Staton announced, "The Muskogee School Board District I-20 has voted to dismiss you as Superintendent of Schools for said District." At p. 910, Footnote 1. The letter was described as "a notice of the proposed dismissal" and the charges contained therein were detailed as "willful neglect of duty and incompetency" without further elaboration. The letter advised Staton of the date of a hearing on the "proposed dismissal."

The hearing was conducted as scheduled. Staton appeared with counsel and witnesses. Only four of the five members of the Board were present at the concluding session of the hearing. Of the four, the three who had expressed previous intent to remove Staton voted for his dismissal. In distinguishing this case from *Withrow v. Larkin*, 421 U.S. 35 (1975), the Court concluded that this was not "simply a case of the instigation of charges and a statement of them during an investigatory phase by the body that will later decide the merits of the charges." At p.914. On the basis of the facts outlined above, the Court held, "We are

convinced that these established circumstances left no room for a determination that there was a decision by a fair tribunal, with the appearance of fairness, in view of the totality of these circumstances." At pp. 914-915.

In *Miller v. City of Mission, Kansas, supra*, the only hearing afforded to Miller was a post-termination hearing. Miller was an assistant police chief. A newly elected mayor called several closed meetings of the city council which were not announced to the public and which took place in private homes. At those meetings, it was decided that Miller would be discharged. Later, Miller was summoned to meet with the mayor and was informed that he was being terminated. The city attorney advised him that he was entitled to a hearing. After the meeting but before the hearing, the mayor publicly announced Miller's termination in press releases. Thereafter, Miller received a letter listing seven reasons for his termination and again informing him that he was entitled to a hearing. Miller requested and received a hearing several months later. At the hearing, Miller received a list of additional reasons for termination. The mayor refused to reinstate Miller after the hearing.

The Tenth Circuit affirmed that part of the District Court's decision which held that Miller had been denied procedural due process. At p. 372. In its affirmance, the Court specifically noted that the hearing officer's own testimony supported the trial court's conclusion that "the public hearing was unfair because the hearing officer 'had a prejudiced mind when he went into the case.'" At p. 372.

The Petitioner's reliance upon *Staton* and *Miller* as being directly applicable to the facts of this case is misleading. Both decisions support the essential principle that due process in the instance of deprivation of a property right requires notice and a meaningful opportunity to respond. However, the findings of *Staton* and *Miller* are patently different from the findings in this case because the facts are so drastically different. In *Staton* and

Miller, the public employee was not given notice of the charges against him or the opportunity to respond prior to the decision to terminate him. As such, the hearings in these cases scarcely can be termed "pre-deprivation hearings."

The Petitioner argues that two or three members of the Board had opinions regarding Cooper and his work prior to the hearing on the charges. The opinions were developed from their knowledge of Cooper and his work which was obtained in their capacity as Board members. More importantly, the Petitioner does not mention the state of mind of the remaining members of the twelve person Board. He imputes the possible bias of two or three members to the entire Board without any factual proof or basis for supposition.

In *Staton*, a significant number of the voting Board members (three out of four) had expressed through prior votes or public statements, their intent to remove the school superintendent before the board hearing. The Petitioner desires to equate this conduct, to the actions of, at most, two or three persons of a twelve person Board who indicated before the hearing their displeasure with the performance of Cooper. The Petitioner ignores the statutory mandate placed upon the Board to review proposed charges as to their nature prior to receiving those charges and notifying the employee. T.C.A. 49-5-511(5). (See Appendix 48 of Petition.)

The Court in *Miller* held, based upon the testimony of the hearing officer, that the sole decisionmaker was prejudiced before the hearing. Therefore, the "tribunal" was prejudiced and the due process requirement of a meaningful opportunity to respond was not met. These findings are not reflected in the Petitioner's restatement of the case that "the Tenth Circuit once again held that where the testimony of *members* of a decision-making tribunal shows that those *members* had prejudiced minds before the beginning of the hearing, the hearing must be found to be unfair." At p. 20 (Emphasis supplied). This

case shows that Cooper received a full evidentiary hearing before a *twelve* person Board.

The decisions in *Staton* and *Miller* do not indicate that the employee in those cases had any opportunity for review following the decision of termination. The *Staton* Court states that the Board's decision was final while in *Miller* the Court indicates that the mayor may have had the final authority to affirm the prior decision to terminate or to reinstate the employee after the hearing. The procedures followed in these cases are not at all similar to the *de novo* judicial hearing afforded Cooper after the full evidentiary hearing before the Board. In the absence of such due process guarantees, the Court in *Staton* and *Miller* would closely scrutinize the demeanor of members of the Board (*Staton*) and the mayor (*Miller*) where those decisionmakers have final authority. As such, the Courts' rulings in these cases rested on two main points: the absence of an impartial tribunal and the lack of a hearing *before* termination. Neither of these factors are present in this case.

In the case of *Hortonville Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, (1976), this Court set forth the proposition that--

> Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decisionmaker... Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.' At p. 493 (Citations omitted)

In that case, the discharged teachers argued that the Board members "had some personal or official stake in the decision whether the teachers should be dismissed, ... and that the Board has manifested some personal bitterness toward the teachers..."

At p. 491. This Court found that the teachers did not demonstrate and the Wisconsin Courts did not find that Board members "had the kind of personal or financial stake in the decision that might create a conflict of interest." At p. 492. In the absence of any findings in this regard and with "nothing in the record to support charges of personal animosity," (at p. 492), this Court applied the above stated proposition to the facts and reversed the holding of the Wisconsin Supreme Court that the school board "was not sufficiently impartial" to render a decision to terminate the teachers. (At pp. 486-487).

Here the Petitioner claims a due process violation because the Board voted to pay the Superintendent's legal fees to bring the charges and because some of its members had opinions about the Petitioner's fitness for the job.

The Superintendent in this case was attempting to fulfill his duties as the Board's administrative head and "Recommender" of personnel matters. See T.C.A. 49-2-301(10). In this light, the Board chose not to make him proceed at *personal* financial loss. Moreover, Fleming's need for legal assistance and his concern for proceeding without it proved all too real. After presenting the charges against Cooper, and the Board voting to dismiss him, Fleming successfully withstood a frontal contempt of court assault by the Petitioner in the Federal District Court for the Middle District of Tennessee. More importantly, however, the Board had dismissed charges against Cooper brought by the same Superintendent less than a year earlier. This record, therefore, does not contain a "specific demonstration of partiality", *Withrow v. Larkin*, supra., or "actual risk of bias or prejudgment", *Id.* The hearing afforded the Petitioner was "meaningful" by every definition of the word. He lost, but the hearing procedures and Tennessee's statutory scheme under which the Board proceeded were and are constitutional.

The Petitioner raised the elements of financial interest and personal animosity in his appeal to the Tennessee Supreme

Court. In its holding, the Tennessee Supreme Court referred directly to *Hortonville*, supra., in stating, "It is axiomatic that due process requires the opportunity of the party charged to be heard at a meaningful time and in a meaningful manner, before an impartial tribunal." Petition at p. A-5. The Court made a specific finding on the issue of bias or prejudice on the part of the Board in the pre-termination hearing. In line with *Hortonville* and *Loudermill*, the Court concluded:

> In our opinion, without question, plaintiff had a meaningful hearing in a meaningful manner before an impartial tribunal in this case, both before the Board and in the *de novo* hearing before the chancellor and there was no violation of his right to due process. Petition at p. A-6.

The Petitioner cites *Moore v. Warrick Public School District No. 29*, 794 F.2d 322 (8th Cir. 1986), for the proposition that he possessed a substantive due process right. According to Petitioner, the Court in *Moore*, relying on *Harrah Independent School District v. Martin*, 440 U.S. 194, (1979), concluded that "a teacher had a substantive due process right to be free from arbitrary and capricious Board action." (Petition at p. 20)

While the *Harrah* decision makes reference to the Due Process Clause as protecting "substantive aspects of liberty against impermissible governmental restrictions," it reversed the Tenth Circuit Court of Appeals decision that a school board had acted in a manner "arbitrary" and "capricious" so as to violate "Fourteenth Amendment notions of fairness embodied in the Due Process Clause..." At p. 197. In reversing, this Court found that the actions of the Board in demanding continuing education units from the teacher and in declining to renew her contract when she refused to enroll in the courses, were well within its responsibility for the public education of students and for employing teachers and were not arbitrary and capricious. This Court also found that by being advised of the Board's decision not to renew her contract and of her right to a hearing before the

board, and by appearing with her attorney at the hearing to contest the charge of wilful neglect of duty, the teacher "was accorded the usual elements of procedural due process." id.

III

THE PETITIONER WAS AFFORDED NOTICE AND A MEANINGFUL OPPORTUNITY TO RESPOND TO THE CHARGES DURING A FULL BOARD HEARING AND A DE NOVO CHANCERY COURT PROCEEDING PRIOR TO TERMINATION

The Petitioner acknowledges that under the Tennessee Teacher Tenure Act, he is entitled to a *de novo* hearing. In fact, he received two *de novo* hearings in this case. Since the Tennessee Teacher Tenure Act provides that the order of the Board is suspended pending determination by the *de novo* hearing, Cooper was not terminated at the conclusion of the Board's hearing. As such, Cooper was entitled to and did receive a pre-termination hearing before an impartial Chancery Court judge prior to his actual discharge. In fact, the Tennessee Supreme Court permitted Cooper an additional *de novo* hearing when it remanded the case in part to the Chancellor for another hearing. Cooper remained under suspension pending the outcome of this second *de novo* hearing.

Petitioner refers to the case of *Matthews v. Harney County, Oregon School District No. 4*, 819 F.2d 889 (9th Cir. 1987), as holding that due process required that the discharged teacher be provided with "a meaningful pre-termination hearing, regardless of the adequacy of the post-termination procedure she received after her dismissal." Petition at p. 20.

Matthews, a public school teacher, was dismissed after she allegedly interfered with a drug investigation by the School Superintendent. She was brought before two Boards on charges stemming from the incident. The High School Board, which first considered the charges, held its meeting in executive session and

while in executive session, received evidence by way of interviews from students and parents. The Board then met with Matthews and gave her the option of either resigning or being fired. Matthews agreed to resign but then withdrew her resignation. She was directed to attend a special meeting of the Board. At that meeting, the Board again went into executive session and, after returning to open session, voted to dismiss Matthews. At p. 892. Matthews was given a written statement of reasons for the dismissal and advised that she could request a hearing. Matthews requested and received a hearing. At the end of the evidentiary hearing, the Board voted unanimously to affirm its earlier decision to dismiss. Later the Elementary School Board met and ratified the High School's termination of Matthews. Matthews requested a hearing from that Board. The Elementary Board held an evidentiary hearing and reaffirmed the action of dismissing Ms. Matthews.

Matthews did not contest the evidentiary hearings nor the adequacy of the post-termination procedures she received after her dismissal. She did contest the "pre-termination" hearing as constitutionally inadequate.

The Court held, in light of the facts, that a jury could find that the initial meeting with Matthews was "meaningless as a pre-termination opportunity to respond" because the Board had already voted to dismiss Matthews. At p. 893. In reversing the District Court's summary judgment in favor of the School Board, the Court stated that "[u]nder *Loudermill*, with respect to her property interest claim, Matthews should have received formal notice of the charges against her, an explanation of the evidence against her, and an opportunity to respond prior to the board's decision to terminate her employment." At p. 894.

The Petitioner's description of the facts to the effect that Matthews' "discharge was subsequently upheld after evidentiary hearings before both boards," (Petition at p. 20) does not take into consideration that those evidentiary hearings were not

attacked by Matthews in the Court case. Instead, it was the closed hearing wherein the decision was reached to terminate Matthews without first giving her notice of the charges or an opportunity to respond during the hearing, that came under attack and failed to meet due process requirements. Again, the court closely reviewed the facts surrounding the procedure provided and concluded from those facts that procedural due process had been denied. The issue was not whether Matthews received a "meaningful" pre-termination hearing as indicated by the Petitioner. Rather, the denial of due process was the result of the denial of the two essential elements: (1) Matthews received no *notice* prior to hearing; and, (2) since the meetings were held in executive session and she was not permitted to attend, Matthews received no *hearing* whatsoever prior to termination.

The cases referred to above have been explained in great detail to demonstrate that the decision of the Tennessee Supreme Court in this case is not inconsistent with the holdings of those cases from Circuits other than the Sixth Circuit which have addressed the issues of bias or prejudice in the decision-making body, or the elements of arbitrary and capricious behavior on the part of a decision-making body in termination of employment cases. The decision of the Tennessee Supreme Court in this case protects the constitutional due process rights of public employees to be provided with notice and a meaningful opportunity to respond prior to termination.

IV

THE PETITIONER HAS FAILED TO DEMONSTRATE THAT THERE IS A CONFLICT AMONG FEDERAL COURTS OF APPEAL IN THE APPLICATION OF THE CONSTITUTIONAL DUE PROCESS PREREQUISITES OF *LOUDERMILL* IN CASES WHERE POST-DEPRIVATION REVIEW IS SUBSTITUTED FOR PRE-DEPRIVATION NOTICE AND OPPORTUNITY TO RESPOND

The Petitioner states that "[n]umerous Federal Courts of Appeal have recognized that post-deprivation remedies are not an adequate substitute for the meaningful pre-deprivation hearing required as a matter of due process." Petition p. 19. The Circuits are in agreement that notice and the opportunity to respond are essential requirements of constitutional due process. The Circuits also are in agreement that in the absence of exceptional circumstances as outlined in decisions of this Court, where there has been no notice of charges or opportunity to respond provided prior to termination, post-termination hearings are inherently unfair and are violative of constitutional due process guarantees. There is nothing in the decision of the Tennessee Supreme Court that is inconsistent with either of these maxims of constitutional due process.

The Petitioner indicates that--

> "[a]t least three Courts of Appeal have specifically held, contrary to the holding of the Supreme Court of Tennessee in this case, that the availability of post-deprivation remedies does not cure the due process deprivation where an employee, with a property interest in continued employment is deprived of that interest in the absence of a meaningful pre-termination hearing." Petition at p. 20.

In support of this contention, the Petitioner relies upon cases from the seventh, first, and eleventh circuits, respectively. Though

not fully explained by the Petitioner, the court in each of these cases closely scrutinized the post-deprivation procedure because there was no pre-termination hearing, and no notice provided to the employee prior to termination. The Petitioner argues that the holdings in these cases are in direct conflict with the holdings of Sixth Circuit and the holding of the Tennessee Supreme Court in this case.

In *Schultz v. Baumgart*, 738 F.2d 231 (7th Cir. 1984), Schultz, a firefighter, received only a letter which informed him that if he did not return to work by a certain date, his employment would be terminated. The Court found that the post-deprivation grievance procedures or board hearing did not cure a violation of Schultz's due process rights. In so ruling, the Court held that "Schultz was entitled to notice and a meaningful opportunity to respond before he was terminated. If he was terminated without those protections, the constitutional deprivation was complete." At p. 237. The Court concluded that the deprivation was "a garden-variety summary dismissal, and the city could have easily complied with requirements for pre-deprivation procedures." At p. 238. Thus, *Schultz* is a case where the city denied the employee notice and a hearing before he was discharged.

In *Kercado-Melendez v. Aponte-Rogue*, 829 F.2d 255 (1st Cir. 1987), Kercado-Melendez, a school superintendent, without prior notice, received a complaint cancelling her teaching certificate and dismissing her as a superintendent. This "cancellation order" was deemed effective upon receipt, however, an appeal if filed within ten days would stay the effect of the order, substituting dismissal with a suspension pending the outcome of the appeal. Relying on *Loudermill*, the Court held:

> Kercado's opportunity to appeal the Secretary's order after being informed of the action is constitutionally inadequate; due process requires that she be given notice of the charges and an opportunity to respond before the action is taken. At p. 263.

In utilizing *Loudermill* as a guide, the Court noted further that "the Secretary was not obliged to conduct a full evidentiary hearing prior to dismissing Kercado." id.

In *Fetner v. City of Roanoke*, 813 F.2d 1183 (11th Cir. 1987), a police chief, without prior notice was informed by the mayor that the city council had unanimously voted to fire him. The District Court held that Fetner had suffered no constitutional deprivation because state personnel proceedings and a personal lawsuit, as post-deprivation remedies, provided adequate due process. In reversing, the Circuit Court held that "The Roanoke City Council had ample time to give Fetner notice and offer him an opportunity to be heard before they fired him." At p. 1185. The Court went on to remark, "Post-deprivation remedies do not provide due process if pre-deprivation remedies are practicable." At p. 1186.

Petitioner's remarks that the holding of the Tennessee Supreme Court in this case is in conflict with the three cases cited above is a gross misstatement of the holding in this case and of the holdings in those cases. The essential due process requirement of an opportunity to be heard at a meaningful time and in a meaningful manner was recognized in each of the three cases and was directly relied upon by the Tennessee Supreme Court in this case. The reason for contrasting results exists in the obvious fact that in this case Cooper was provided notice of charges and an opportunity to respond before the action was taken as required by *Loudermill* and as found lacking by the Courts in *Schultz*, *Kercado-Melendez*, and *Fetner*.

Notwithstanding, the fact that the above cited cases involve factual situations where employees were afforded no pre-termination hearings, the Petitioner has selected these cases to convey the appearance of a conflict among Circuits on the issue of bias at the pre-termination level and whether such bias may be cured through a post-deprivation hearing. The Petitioner draws the distinction in the following manner:

> However, at least three Circuits, including the Sixth Circuit which includes the State of Tennessee, have heldthat bias of a decisionmaker at the pre-termination level is irrelevant where post-deprivation remedies are available." Petition at p. 21.

In *Schaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1987), cited by the Petitioner as in conflict, the Fifth Circuit Court determined that the police captain discharged in connection with criminal violations, received, "much more process than simply notice and an opportunity to respond." At p. 714. The Court noted that Schaper was advised of the proposed dismissal, given a list of reasons for the decision and provided an opportunity to object to the decision. Perhaps, most significant from the pre-termination aspect, Schaper received a hearing, with counsel and witnesses permitted, before he was actually discharged from the police force. See p. 714. The Court, relying on *Loudermill*, determined that at the pre-termination level elaborate proceedings were not mandated. However, "the suostantial property interest one has in not being deprived of a livelihood requires a full hearing after termination." At p. 716.

In *Garraghty v. Jordan*, 830 F.2d 1295 (4th Cir. 1987), a prison warden alleged civil rights and procedural due process violations after receiving a five day suspension for insubordination. The Court closely examined the facts leading up to the decision to suspend Garraghty and concluded that Garraghty had received sufficient due process protections. The Court utilized the balancing test in *Loudermill*, and found that Garraghty received sufficient notice and was afforded an opportunity to respond to the charges. The Court held, "Due process principles did not require that a neutral decisionmaker, rather than Jordan [the superintendent], make the decision to suspend Garraghty. A pre-deprivation proceeding need not be a full evidentiary hearing with witnesses and a neutral decisionmaker so long as the employee is given an opportunity to answer the charges." At p.

1302. The Court explained this holding in light of the facts of the case presented to it.

> "The deprivation caused by a short-term suspension when balanced with the government's interest in expeditious and effective discipline and the administrative burden of providing a neutral decisionmaker for every routine suspension, does not warrant pre-deprivation proceedings before a neutral party." id.

While its principles are sound, the facts in *Garraghty* are not comparable to this case where Cooper received full and timely notice of charges, a full evidentiary hearing, a complete *de novo* review of the decision and a review by the Tennessee Supreme Court of all facts and procedures utilized in the findings.

The Petitioner relies heavily upon the case of *Duchesne v. Williams*, 849 F.2d 1004 (6th Cir. 1988), cert. denied, 109 S.Ct. 1535 (1989), in attempting to demonstrate a conflict among circuits. In *Duchesne*, a Chief Building Inspector was advised that he was being terminated for several reasons, including "improper conduct." Duchesne's attorney requested a pre-termination due process hearing upon receiving notice of termination. When the City Manager refused to reinstate Duchesne pending the hearing, Duchesne filed suit in federal district court. Thereafter, Duchesne received a written description of the reasons for discharge and a pre-termination hearing took place over several days. Duchesne was represented by legal counsel and given an opportunity to present witnesses and to cross-examine adverse witnesses. The City Manager who terminated Duchesne presided over the hearing, testified against Duchesne and after the hearing reaffirmed the discharge.

In reversing the district court decision calling for a "neutral decisionmaker", the Sixth Circuit Court relied heavily upon *Loudermill*. The Court took particular note of the fact that this Court, in *Loudermill*, had accepted its (the Sixth Circuit's) reasoning regarding the distinctly different purposes of a

pre-termination presentation and a later formal hearing to adjudicate facts. See discussion at p. 1006-1007. "The *Loudermill* majority deliberately chose not to include within its definition of pre-termination hearing rights the panoply of trial-type hearing rights advocated by Justice Marshall, which included a full evidentiary, adversary, adjudicatory hearing with an impartial judge." At p. 1007. The Court later noted, "We acknowledge that there may be cases--perhaps this is one of them--in which the supervisory official is so biased that the *Loudermill* "right-of-reply" process is meaningless. The full post-termination, adversary, trial-type hearing will serve to ferret out bias, pretext, deception and corruption by the employer in discharging the employee". At p. 1008.

The Petitioner's reliance upon *Schaper*, *Garraghty*, and *Duchesne* does not demonstrate a conflict among federal courts of appeal on the issue of meaningful pre-deprivation notice and opportunity to respond versus full trial-type hearings provided as post-deprivation relief. In the cases cited by the Petitioner where post-deprivation hearings were deemed constitutionally inadequate, the employees were not afforded notice or an opportunity to respond prior to termination. In the cases relied upon by the Petitioner to indicate that post-deprivation hearings may be constitutionally proper, the appellate court found in each case, from the facts in the record, that the employee was afforded due process protection in the form of notice and an opportunity to respond prior to termination.

Even if the Petitioner were able to demonstrate some inconsistency in the applications of *Loudermill* in *Schaper*, *Garraghty* and *Duchesne* in comparison to other Circuits, the instant case is not the case in which those inconsistencies should be more closely examined. This case provided a full range of due process protections to the Petitioner at a meaningful time and in a meaningful manner. The Tennessee Supreme Court has applied properly the dictates and guidelines set forth by this Court in *Loudermill* and it has closely examined the facts in the record to

conclude that, not only were due process protections afforded to the Petitioner but also, the findings of both the Board and the chancery court giving rise to the dismissal of the Petitioner were "in full accord with the preponderance of the evidence." (At A-4).

Petitioner has not demonstrated a connection between the holding in the *Duchesne* case and the facts of this case. While the holding of *Duchesne* sets forth that a neutral decisionmaker is not required and that post-termination review is sufficient to rectify any faults in the pre-termination process, *Duchesne* is still not on point with the facts in Cooper. In this case, Cooper received a full evidentiary hearing *before* a decision by the board. Cooper was not terminated, but suspended pending review by the chancery court. The chancery court conducted a *de novo* review of the decision and based upon the facts found that Cooper was subject to dismissal. Cooper has not demonstrated that the board was biased, only that it had a combined responsibility, under statute, to initiate, investigate and adjudicate charges against teachers within its school system.

The Petitioner's remark that the outcome of the hearing was "pre-determined" (Petition at p. 24) ignores the facts in the record to the effect that Cooper had a hearing on previous charges which resulted in those charges being dismissed and Cooper being returned to his post as principal. It also ignores the extensive deliberations by the twelve member Board wherein there were a number of individual findings upon the charges presented to the Board. Further the remark "that Cooper's opportunity to respond 'was nothing more than a sham'" (Petition at p. 23) reveals Cooper's shallow treatment of the facts. For Cooper to consider as "a sham" a process wherein he received a full evidentiary hearing before the board, a *de novo* review by a state chancery court, a review of procedures and facts by the Tennessee Supreme Court and a second *de novo* hearing with an additional opportunity to present evidence to the chancellor, is to ignore the tenet that due process is not geared toward a specific

outcome, and in turn, to assert to the contrary that where a certain result has not been achieved, due process has not been afforded.

"Due process, as this Court has repeatedly held, is a term that 'negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers v. McElroy*. 367 U.S. 866, 895, (1961) 81 S. Ct. 1743, 1748, 6 L.Ed. 2d 1230 (1961)". *Hortonville*, supra., at p. 494. The Petitioner appears to advocate an inflexible application of due process such that anytime any individual member of an administrative agency may develop a preconceived notion of the facts in a discharge matter, notwithstanding the fact that the individual is only one of many on a board which will make a collective decision, and notwithstanding the fact that the decision of the Board is subject to *de novo* review by an impartial judicial tribunal, the process becomes so constitutionally tainted as to void the entire process. Certainly this is not the intention of this Court in requiring notice and an opportunity to respond at a meaningful time and in a meaningful manner. Nor does it appear to be the intent of the decisions of federal courts of appeal when they apply the *Loudermill* standard to the individual facts and circumstances which confront them in the individual cases before them. (See also *Brasslett v. Cota*, 761 F.2d 827 (1st Cir., 1985; *O'Brien v. DiGrazia*, 544 F.2d 543, 546-547 (1st Cir., 1976) cert. den. sub nom *O'Brien v. Jordan*, 431 U.S. 914 (1977); *Perkins v. Board of Directors*, 528 F. Supp. 1313 (1981), AFF'd, 686 F.2d 49 (1st Cir. 1982).

CONCLUSION

The Petitioner submits that the Tennessee Supreme Court is oblivious to his due process rights and declares the same to be "of no consequence". At p. 24. Then, to support his argument that *Cooper I* and *Cooper II* have far reaching effects, he states that those decisions are --

> a license to school boards to run roughshod over the constitutional rights of tenured teachers without fear of consequence. School boards, as well as other administrative bodies that adjudicate, need not provide any semblance of a meaningful hearing to those who appear before them, even where property rights protected by the Fourteenth Amendment are at stake. (Page 25, Petitioner's Writ).

Petitioner needs to ask Ms. Turk how roughshod school boards are allowed to run over tenured teachers' rights. Petitioner needs to inquire of Frances Marie Williams how lax and indifferent the Tennessee Supreme Court is toward the teachers' rights under the Tennessee Teacher Tenure Act. See *Williams v. Pittard*, 604 S.W.2d 845 (Tenn. 1980). Petitioner should ask Elayne Sanders if the Tennessee Supreme court recognizes the property rights of tenured teachers. *Sanders v. Vinson*, 558 S.W.2d 838 (Tenn. 1977). Petitioner would do well to call Hildred Wagner and ask her if the Supreme Court of Tennessee recognizes such legal doctrines as due process, notice, and the right to be heard. *Wagner v. Elizabethton City Board of Education*, 496 S.W.2d 468 (Tenn. 1973). Stated simply, the far reaching effect of *Cooper I* and *Cooper II* extends no further than ***Mr. Cooper's*** insubordination, inefficiency, neglect of duty and incompetency.

The Writ should be denied.

Respectfully submitted,

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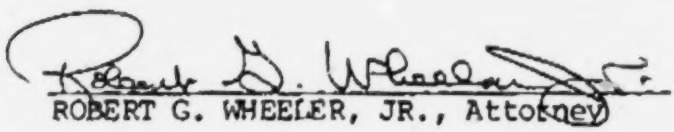
CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari have been placed in the United States Mail, first-class postage prepaid, addressed to W. Ovid Collins, Jr., Richard L. Colbert, and Charles Hampton White, Attorneys for the Petitioner, at their offices at Cornelius & Collins, Suite 2900, Third National Financial Center, P. O. Box 2808, Nashville, Tennessee 37219, phone number (615) 244-1440, the last address of Cornelius & Collins known to me, on this the 15th day of April, 1991.



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